No. 3057

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Plaintiff in Error,

vs.

MATILDA C. NEASHAM,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Nevada, Honorable Wm. C. Van Fleet, Presiding

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

THOMAS E. KEPNER,
Attorney for Defendant in Error, Reno, Nevada

WM SUTHERLAND, PRINTER, RENO, NEVADA.

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PRELIMINARY STATEMENT:

This is an action by the widow of William C. Neasham, deceased, against the New York Life Insurance Company, a corporation, to recover on

the contract of insurance, No. 4707986 appended to the original record, issued by said company to her husband, in which contract she is named as beneficiary. The contract was made and delivered in July, 1914, and is payable by its terms on due proof of death. It contains a stipulation or condition, printed on the third page, avoiding the contract in the event of self-destruction during the first insurance year (Record, page 5). The insured met a violent death, during the first insurance year, to-wit, February 27, 1915; proofs of death were made on March 15, 1915; payment was refused, and this action was commenced by the beneficiary (Defendant in Error) in the Nevada State court on April 30, 1915. The case was thereafter removed by the New York Life Insurance Company, but without any opposition on the part of the beneficiary, to the United States District Court of the District of Nevada; a demurrer was thereupon, by said Company interposed and thereafter overruled (Record, page 9); the company (Plaintiff in Error), in its amended answer, averred that the insured died during the first insurance year, from a self-inflicted gunshot wound—a suicide (Record, pages 9-13); the beneficiary (Defendant in Error) replying to the new matter set up in the amended answer, after denying the allegations thereof, alleged that the insured came to his death (A) **At the hands of some person or persons unknown to her**, (Reply, paragraph II, Record, page

14); or (B) **That he came to his death from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff.** (Reply, paragraph V, Record, page 16.) The issue, thus presented by the pleadings involving three theories of the cause of death, namely, Murder, Suicide, and Accident, was tried before Hon. Wm. C. Van Fleet and a jury; the jury found the issue in favor of the defendant in error for the full amount of the contract of insurance and interest (Record, page 16); judgment was thereupon duly entered against said company (Plaintiff in Error), on March 10, 1916, for the sum of $10,689.30 and costs taxed in the sum of $175.72 (Record, page 17). The defendant company thereupon interposed its motion for new trial, which was considered by the District Court, a supersedeas bond was given, and on January 13, 1917, the motion for new trial was argued and thereafter submitted to the court and on July 16, 1917, said motion for new trial was duly denied (Record, pages 18 to 42, inclusive, and pages 51 and 52).

The case is here upon writ of error sued out by said New York Life Insurance Company, as Plaintiff in Error, and a stay bond or supersedeas was given. (See Stipulation as to Printing the Record, paragraph 7, Record, page 330.)

BRIEF:

I.

NEITHER IN MAKING PROOF OF DEATH

ON A CONTRACT OF LIFE INSURANCE, PAYABLE BY ITS TERMS ON DUE PROOF OF DEATH, NOR IN THE ALLEGATIONS OF A COMPLAINT THEREUNDER, IS IT NECESSARY FOR THE BENEFICIARY TO ALLEGE THE CAUSE OF DEATH, OR TO ANTICIPATE DEFENSES. A PRIMA FACIE CASE FOR THE BENEFICIARY UNDER SUCH POLICY CONSISTS IN SHOWING—
(A) THE EXISTENCE OF THE CONTRACT;
(B) THE DEATH OF THE INSURED; AND
(C) THE FURNISHING OF PROOF OF DEATH.

Assignment I, and paragraph 5, Assignment II, Record, pages 52, and 54;

Charter Oak Life Insurance Company vs. Rodel, 95 U. S., 232;

Aetna Life Insurance Company vs. Milward, 118 Kentucky, 716;

4 American and English Annotated Cases, 1092;

82 Southwestern Reporter, 364;

68 L. R. A., 285;

Security Bank vs. Equitable Life Assurance Society, 112 Virginia, 642;

27 American and English Annotated Cases, 836, 842;

Coffin vs. New York Life Insurance Company, 127 Federal Reporter, 555;

Kendrick vs. Mutual Life Insurance Company, 124 North Carolina, 315;
70 American State Reports, 592;

Starr vs. Aetna Life Insurance Company (Wash.), 4 L. R. A., new series, 636;

Redmen's Fraternal Association vs. Rippey (Indiana), 50 L. R. A., new series, 1006;
25 CYC., 917.

II.

THE LOVE OF LIFE IS INSTINCTIVE. SELF-PRESERVATION IS ITS FIRST AND STRONGEST LAW. THE PRESUMPTION OF LAW AND FACT IS AGAINST SUICIDE. THE BURDEN OF PROVING SELF-DESTRUCTION RESTED UPON THE DEFENDANT COMPANY. IN OTHER WORDS, THE BURDEN RESTED UPON PLAINTIFF IN ERROR TO BRING THE CAUSE OF DEATH, BY A FAIR PREPONDERANCE OF COMPETENT EVIDENCE, WITHIN THE EXCEPTION OF THE POLICY RELIED UPON.

Assignments Nos. I, II, and III, Record, pages 52, 53, 54, 55, 56;

Aetna Life Insurance Company vs. Milward, 118 Kentucky, 716;

4 American and English Annotated Cases, 1092;
82 Southwestern Reporter, 364, 366;
68 L. R. A., 285;

Standard Insurance Company vs. Thornton, 100 Federal Reporter, 582;
49 L. R. A., 116;

Kornig vs. Western Life Indemnity Company, 102 Minnesota, 31;
112 Northwestern Reporter, 1039;

Lindahl vs. Supreme Court I. O. F. (Minn.); 110 Northwestern Reporter, 358;

Starr vs. Aetna Life Insurance Company, 4 L. R. A., new series, 636;

Redmen's Fraternal Association vs. Rippey, 50 L. R. A., new series, 1006;

Jenkin vs. Pacific Mutual Life Insurance Company, 131 Cal. 121, 83 Pacific Reporter, 180;
75 Northwestern Reporter, 445;

Burnham vs. Interstate Casualty Company, 117 Michigan, 142;
75 Northwestern Reporter, 445;

Elliott on Evidence, Sections 2391, 2394;

Insurance Company vs. Hairston, 108 Virginia, 832;
128 American State Reports, 989, 1004.

III.

EXPERT WITNESSES WERE NOT, AND SHOULD NOT BE, PERMITTED TO DECIDE THE CASE. PARTIES ARE ENTITLED TO THE VERDICT OF A JURY, WHICH IS USUALLY SAFER THAN THE OPINIONS OF HIRED

AND GENERALLY BIASED PROFESSIONAL WITNESSES. THE QUESTION WHETHER OR NO THE DEATH WOUND WAS SELF-INFLICTED IS NOT THE SUBJECT OF EXPERT OPINION.

Assignments Nos. IV and V, Record, pages 56 and 57;

Manhattan Life Insurance Company vs. Beard, 66 Southwestern Reporter, 35;

Aetna Life Insurance Company vs. Kaiser, 115 Kentucky 539;
74 Southwestern Reporter, 203;

Furbush vs. Maryland Casualty Company, 131 Michigan, 234;
91 Northwestern Reporter, 135;
100 American State Reports, 605;
2 Jones Commentaries on Evidence, 372, 373;

Ferguson vs. Hubbell, 97 New York, 507;
49 American Reports, 544.

IV.

WHERE THE EVIDENCE IS SUCH AS TO ADMIT THE THEORY OF SELF-DESTRUCTION, MURDER, OR ACCIDENT, EVERY CIRCUMSTANCE SURROUNDING THE DEATH IS ADMISSIBLE IN ORDER TO ENABLE THE JURY TO ANSWER THE QUESTION,—HOW AND BY WHOM WAS THE DEATH WOUND INFLICTED?

Assignment No. VI, Record, page 58;

Kornig vs. Western Life Indemnity Company, 102 Minnesota, 31;
112 Northwestern Reporter, 1039;

Metropolitan Life Insurance Company vs. De Vault's Administrator, 17 American and English Annotated Cases, note at page 35.

V.

DEPOSITIONS OR STATEMENTS OF WITNESSES MADE BEFORE A CORONER'S JURY AT AN INQUEST MAY BE USED ON THE TRIAL OF A CASE ARISING OUT OF THE DEATH OF THE PERSON UPON WHOSE BODY THE INQUEST WAS HELD TO CONTRADICT OR IMPEACH SUCH WITNESSES. SECTION 7550 OF THE REVISED LAWS OF NEVADA, BORROWED FROM SECTION 1515 OF THE PENAL CODE OF CALIFORNIA, PROVIDES THAT—"THE TESTIMONY AT SUCH INQUEST SHALL BE REDUCED TO WRITING BY THE JUSTICE OF THE PEACE, ACTING AS CORONER, OR AS HE MAY DIRECT, AND BY HIM, WITHOUT DELAY, FILED IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT OF THE COUNTY."

Assignment No. VII, Record, page 58;
7550 Nevada Revised Laws, 1912;
1515 Penal Code of California;
7 Encyclopedia of Evidence, 54, 57.

VI.

THE PRESUMPTION IS ALWAYS AGAINST CRIME. IN AN ACTION ON A CONTRACT OF LIFE INSURANCE, PAYABLE BY ITS TERMS ON DUE PROOF OF DEATH, IF THE EVIDENCE BE SUCH AS TO ADMIT THE THEORY OF MURDER, SUICIDE, OR ACCIDENT, THE PRESUMPTION IN FAVOR OF ACCIDENTAL DEATH IS CONTROLLING.

Assignment No. XI, Record, page 62;

Aetna Life Insurance Company vs. Milward, 118 Kentucky, 716;
4 American and English Annotated Cases, 1092;
82 Southwestern Reporter, 364, 336;
68 L. R. A., 285;

Home Benefit Association vs. Sargent, 142 United States, 691;

Boynton vs. Equitable Life Assurance Society, 105 Louisiana, 202;
52 L. R. A., 687;

Kornig vs. Western Life Indemnity Company, 102 Minnesota, 31;
112 Northwestern Reporter, 1039;

Fidelity & Casualty Company vs. Love, 111 Federal Reporter, 773;

National Union vs. Fitzpatrick, 133 Federal Reporter, 694;

Grand Lodge vs. Beck, 181 U. S., 49;

O'Conner vs. Modern Woodmen of America, 25 L. R. A., new series, 1244;

Metropolitan Life Insurance Company vs. De Vault's Administrator, 109 Virginia, 392; 17 American and English Annotated Cases, 27;

Modern Woodmen of America, vs. Kincheloe, 175 Indiana, 563; 28 American and English Annotated Cases, 1259, 1262;

Grand Lodge vs. Bannister, 80 Arkansas, 185; 96 Southwestern Reporter, 742.

VII.

IF AN EXAMINATION OF THE EVIDENCE DISCLOSED BY THIS RECORD IS PERMISSIBLE UNDER THE ASSIGNMENTS OF ERROR ALLEGING THAT THERE IS NO EVIDENCE TO SUSTAIN THE VERDICT, A CANDID EXAMINATION OF ALL OF THE EVIDENCE IN THE CASE WILL LEND NO COMFORT TO PLAINTIFF IN ERROR.

CIRCUMSTANCES MUST BE PROVED, NOT ASSUMED. THAT A PRESUMPTION CANNOT BE BASED UPON A PRESUMPTION, AN ASSUMPTION OF FACT DRAWN FROM ANOTHER ASSUMPTION OF FACT, OR AN INFERENCE OF FACT PREDICATED UPON ANOTHER INFERENCE OF FACT, IS A FUNDAMENTAL PRINCIPAL OF LOGIC AND

OF LAW. STARTING WITH THE THEORY OF SUICIDE, PLAINTIFF IN ERROR ASSUMES THAT INSURED SHOT HIMSELF, BECAUSE IT IS ASSUMED THAT HE INTENDED TO DESTROY HIMSELF, BECAUSE IT IS ASSUMED THAT THE DEATH WOUND (LARGE AS THE MIDDLE FINGER OF A MAN'S HAND) WAS CAUSED BY THE LITTLE .32 CALIBER SAVAGE AUTOMATIC PISTOL FOUND NEAR THE BODY, BECAUSE IT IS ASSUMED, IN THE FACE OF DIRT IN THE BARREL, THAT THE PISTOL HAD RECENTLY BEEN DISCHARGED.

SUCH A METHOD AT ARRIVING AT AN ULTIMATE FACT IS UNIFORMILY CONDEMNED.

Assignments II, VIII, IX, X, XII, XIII and XIV, Record, pages 52, 59, 61, 66, 68;
1 Moore on Facts, 599;
14 Encyclopedia of Evidence, 101;
3 Chamberlayne's Modern Law of Evidence, 1764;

Evansville Metal Bed Company vs. Loge, 85 Northeastern Reporter, 979, 981;

United States Fidelity & Casualty Company vs. Des Moines National Bank, 145 Federal Reporter, 273;

Cosgrove vs. Pitman, 103 California, 268;

United States vs. Ross, 92 U. S., 281;

Manning vs. John Hancock Mutual Life Insurance Company, 100 United States, 693, 699;

Globe Accident Insurance Company vs. Gerisch, 163 Illinois, 625;
54 American State Reports, 486;

Modern Woodmen of America vs. Kozak, 63 Nebraska, 153;
88 Northwestern Reporter, 248;

Truckee River General Electric Company vs. Benner, 211 Federal Reporter, 79, 81.

ARGUMENT:

I

In alleged error, number I, it is contended that the demurrer to the complaint was improperly overruled. In subdivision 5, Assignment No. II, it is suggested that the proofs of death (Record, pages 308, 313) were insufficient. The contention seems to be both with reference to the complaint and proofs of loss, that "it does not appear * * * whether the insured, William C. Neasham, was or was not guilty of self-destruction;" (See Record, page 6, for the demurrer, and page 54 for assignment relating to proofs of death.) The complaint contains a concise statement of the contract of insurance, the consideration therefor the furnishing of due proofs of death, and the failure of the defendant company to pay the amount of the contract. This is a sufficient complaint under the

general law on the subject of life insurance. It is well settled that in an action on such contract—

> "The complaint need not anticipate defenses, such as limitations, **death by suicide**, the falsity of answers of the insured in his application, or that an assignment of the policy is void as a wagering transaction."

25 CYC., 917;
Record, pages 1 and 2.

There is nothing in the language of the contract which forms the basis of this action which, in any manner, changed the general rule above stated, or made it necessary for the beneficiary (Defendant in Error) to depart from the usual rules of pleading.

Record, pages 4 and 5.

In **Charter Oak Life Insurance Company vs. Rodel,** (95 U. S.), the Supreme Court speaks specificially of the sufficiency of the proofs of loss, which in effect states the requirements of a **prima facie** case for plaintiff in an action on a contract of life insurance very like the one presented in the instant case. Mr. Justice Bradley, delivering the opinion of the Supreme Court, used this language:

> "Of course, the company could not justly contend that it might arbitrarily object to the sufficiency of the proofs; but it had an undoubted

right to demand and insist upon such proofs as the law would adjudge to be reasonable and satisfactory. **The objection to those furnished was that, whilst otherwise sufficient as proofs of death of the insured, they disclosed at the same time a cause of death which exempted the company from liability; and hence could not be said to be sufficient proof of 'the just claim of the assured' as well as of the death of Rodel. * * * * Proof of death was all that was required.** This was given and does not appear to have been objected to."

Record, page 83.

In **Kendrick vs. Mutual Life Insurance Company** (124 North Carolina, 315, 70 American State Reports, 592), the Supreme Court of North Carolina, speaking of the elements necessary to a **prima facie** case for the beneficiary, in an action on a contract of life insurance very like the one which forms the basis of this suit, used the following language:

"Plaintiff to whom the policy was payable, was in possession of the policy at the death of the insured, and, the death of the insured being admitted, this made out a **prima facie** case."

In **Aetna Life Insurance Company vs. Milward** (118 Kentucky, 716, 4 American and English Annotated Cases, 1092), the contract of insurance

declared upon insured against injury and death resulting from external, violent and accidental means, and contained many provisions for graduated indemnity, depending upon the nature and extent of the injury, and the calling and exposure of the insured, more to be paid in certain contingencies than in others. The Supreme Court of Kentucky, said:—

> "In a suit upon such policy, it is not necessary for the plaintiff to state that he was not suing to recover under certain clauses not relied on, or for certain injuries not received, nor to negative any of the provisions of the policy not made conditions precedent to his right to institute the suit."

In **Kornig vs. Western Life Indemnity Company** (102 Minnesota, 31), the supreme Court of Minnesota, disposed of a contention such as that presented by the plaintiff in error in the assignments referred to, in these words:

> "It is the defendant who must, when circumstantial evidence is relied on, establish such facts as preclude the hypothesis of natural, violent, or accidental death. **The burden of proof does not rest on the plaintiff to establish such facts as justify demonstrate or the theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide."**

If any proposition can be said to be established, it is that in an action on a contract of life insurance, payable by its terms on due proof of death, the person seeking to recover need not allege that the death of the insured did not result from any cause, which, by the terms of the contract, would relieve the company from liability thereunder. The learned editors of the Lawyers Reports Annotated in Starr vs. Insurance Company (4 L. R. A., new series, 636); and Redmen's Fraternal Association vs. Rippey (50 L. R. A., new series, 1006) have in elaborate notes, covered the whole subject regarding presumptions, burden of proof, and the appropriate allegations of a complaint in actions of this character and to those notes attention is invited.

II

The next group of alleged errors, namely, I, II, and III, presents but the one question of law: Upon whom is the burden of proving suicide? More specifically (a) the first assignment avers that the demurrer to the complaint was improperly overruled, which has been satisfactorily disposed of. (b) The second assignment presents a variety of suggestions as to why the District Court erred in denying the motion of plaintiff in error for a nonsuit or directed verdict at the conclusion of the case in chief for the beneficiary (Defendant in Error), **all of which are based upon the fallacy that the burden was upon the beneficiary to prove**

that the insured did not commit suicide. It is probable that the matters complained of in this second assignment are not subject to review for the reason that they involve an examination of the evidence (**Truckee River General Electric Company** vs. **Benner**, 211 Federal Reporter, 79); but, in any event, the only question of law presented by this alleged error, is the same as that presented by the first, and (c) the same question is presented in converse form in Assignment III, —Complaint is there made that the District Court imposed the burden of proving self-destruction upon Plaintiff in Error.

Record, pages 52, 53, 54, 55 and 56.

So this group of alleged errors presents but the one question of law regarding the burden of proof in actions of this precise kind, where the issue raised by the pleadings admits the theory of Murder, Self-Destruction or Accident, and the proof is wholly circumstantial. How and by whom was the death wound inflicted? The contentions of Plaintiff in Error have been urged, time and time again, both in the Federal and State courts, and have been uniformily overruled where the action was predicated upon a contract of life insurance, payable by its terms, on due proof of death. That the presumption of law is against suicide, and the burden of establishing that fact by a fair preponderance of competent evidence, is upon the insurance company has been settled beyond candid dis-

pute in a long line of cases; but, so far as the research of Counsel has gone, there has been no decision on this question in the Circuit Court of Appeals for the Ninth Circuit, and a few of the authorities, limited to those particular cases where the facts presented were at least as sinister as those relied upon by Plaintiff in Error, will out of an abundance of caution be briefly reviewed.

In **Aetna Life Insurance Company vs. Milward** (4 American and English Annotated Cases, 1092), the circumstances surrounding the death of the insured, as stated by the Supreme Court of Kentucky, were as follows:

> "The insured was found dead from the effect of a pistol shot wound in the head. His body, partially disrobed as he had slept, was discovered lying in a small porch or entry, which was partially enclosed at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side, behind the ear, and passed through in nearly a straight line. The two pistols were lying rather to his right side. He was right-handed. His domestic relations were apparently pleasant, being happily married. He had, also, two young children. His health was good. His mercantile business was prospering satisfactorily. He was about thirty-four years old, and a man of good habits and character. The shot which killed him was fired

about dawn, November 21, 1900. It was heard by but one person who testified in the record. The tragedy was unseen by any witness in the case. Appellee, widow of deceased and her two infants slept in an upstairs room, but were not aroused by the shot. There was no other evidence of violence, nor of the presence of another person at the scene of the killing. The backyard, where it occurred, had walks leading to it which were paved, and would not, for that reason, have shown tracks. One of the pistols probably belonged to the deceased, or had recently been in his possession. It was a nickle-plated Iver-Johnson revolver. The other, a blue steel barrel pistol, was not identified as to its ownership. It was from the latter the fatal shot was fired. There was some evidence that the insured was a man of intense application to business, was of a nervous temperament; that he had a year or so previous to his death consulted a physician, who had advised him to take a rest on account of nervous exhaustion or depression, and that he took a vacation of two or three weeks in the northwest. After his return the physician found him restored to health and quit treating him. A few days before his death deceased complained of pain in the back of his head."

Discussing these facts, the Court said (4 American and English Annotated Cases, at page 1093)—

"Appellant argues that the verdict is flagrant-

ly against the evidence, because, it is contended, the evidence, of which the foregoing is a fair epitome, shows clearly that the death was suicide; or, in any other view of it, fails to show that the death was caused by accidental means, and therefore there was a failure of proof on behalf of the plaintiff. As indicated the evidence is wholly circumstantial. It may none the less point as unerringly to a correct conclusion as if detailed by eye witnesses. It will not do to say that in such case the jury is required to 'guess' the cause. It is unlike where the circumstances do not show the cause of the occurrence. * * * The nature of the wound shows conclusively that the cause of death was both violent and external. The date of the occurrence is within the duration of the policy of insurance. The only remaining question was whether it was accidental in the meaning of the contract. Aside from legal presumptions, about which the jury were not instructed in this case, though they may properly have been, we are unable to say from the evidence that the verdict is not true. It is reasonably clear, at least most probable, that if the deceased had a pistol at all, it was the one, and so far as the record shows the only one to which he had access—the nickle-plated revolver —from which the fatal shot was not fired. That it was not fired by him is indicated by the place of the wound, its entry being on the opposite side

of the head from that which would have been the easiest and most natural if suicide had been done. Absence of scorching of the hair and of powder burn in sufficient quantity also negative the theory that a right-handed man had placed the muzzle of the pistol where it must have been done by decedent to have inflicted that shot. That the pistols were found on the right side of the body seems to refute the theory that decedent, contrary to his habit and instinct of using his right hand, used his left in this act. The instantaneous effect of such a wound is to produce paralysis of the volition. Death was immediate, so far as the ability to dispose of anything in his hand was concerned. The surrounding circumstances are not in harmony with the view that the insured took his own life. They tend to show that the act was not the probable course of a sane person who was bent upon destroying his life. There was no hint in the evidence of any symptom of insanity. Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what in the experience of mankind has been found to be generally the cause or result of similar occurrences. From these the mind deduces the most probable cause of the occurrence in question. The result of this process of reasoning has been found to be so unvarying as to justify its adop-

tion as a rule of evidence. The jury were authorized to apply to the facts detailed their knowledge of human nature, and to indulge, in the aid of deduction, predicated upon the established facts, those presumptions which common experience has established, and which therefore the law allows. The love of life is instinctive; self-preservation is its first, as it is its strongest, law. In the absence of mental derangement, of any known fact, calculated to unseat the judgment and overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all the facts are inconsistent with the theory of suicide, except simply that of the dead body in the presence of its instrument, it would be unnatural and illogical to confine the inquiry to that incident and declare the death suicide. The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact. The jury ought to have given place to that presumption in determining what, in the light of the evidence, was the cause of the death. By this process they were warranted, under the evidence in this case, in saying that the death was not suicide.

"Nor does the law presume that murder or other crime was committed. There was not enough evidence probably to say that murder

was done. Still, the inquiry had led the jury to logically say that the death was from a cause violent and external, and not purposely self-inflicted. Such a wound, not having been inflicted with suicidal intent, was necessarily done by the decedent unintentionally, or, as the evidence indicated to be more likely, was done by some one else. As the presumption is also against crime, in the absence of evidence of that fact, the jury was not authorized to say that the wound was purposely inflicted by another. The conclusion from this state of the record inevitably follows that decedent came to his death by an unintentional, that is, an accidental, shot fired either by himself or by some other person unknown to the jury. Nor does it matter, so far as the liability of appellant is concerned, which it was. In either event it was an accidental death, within the meaning of the policy of insurance."

In **Standard Life Insurance Company vs. Thornton** (100 Federal Reporter, 582), Mr. Justice Day, speaking of the presumption against suicide and the weight and effect of that presumption in an action of this character, used these words:

"This presumption must stand in the case and be decisive of it, until overcome by testimony which shall outweigh the presumption. It casts upon the defendant, who claims that the

death was intentional, the burden of establishing it by a preponderance of evidence."

In **Lindhal vs. Supreme Court, Independent Order of Foresters** (110 Northwestern Reporter, 358), the supreme court of Minnesota had before it a case where the issues presented were very like those here, and the rules generally accepted on this subject were thus summarized by Mr. Justice Elliott, sometime lecturer on the subject of insurance in the University of Minnesota, and the author of a number of text-books, including Insurance and Corporations:

> "The defense being suicide, it is held (a) The burden of proving that the deceased committed suicide is upon the defendant. (b) The presumption is against suicide. (c) If the known facts are consistent with the theory of natural or accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide. (d) When circumstantial evidence is relied on, the defendant must establish facts which exclude any reasonable hypothesis of natural or accidental death."

Continuing (110 Northwestern Reporter, page 361, column 2), the Supreme Court of Minnesota said:

> "The burden is upon the defendant to show that the circumstances and conditions are incon-

sistent with any other reasonable cause of death than that of suicide; that is, it must eliminate and disprove all other causes of death which are consistent with the evidence before the jury is justified in inferring that the deceased committed suicide."

In **Starr vs. Insurance Company** (4 L. R. A., new series, 636), the following is found:

"It would seem, however, that where the death of the assured must have resulted from murder, suicide, or accident, the evidence excluding any other hypothesis, the death would be presumed to be accidental; neither the presumption that it was self-inflicted, nor that it was intentionally caused by another, can be indulged in. Indeed, the presumption is that it was not."

In **Jenkin vs. Pacific Mutual Life Insurance Company**, (131 California, 121), the supreme Court of California had under consideration a case where the insured was found dead from the effects of a gunshot wound, there being no evidence in the record to show either how or by whom the injury was inflicted. The following language is pertinent:

"That the courts will presume that the death was the result of accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems

to be a rule upheld by the great weight of authority."

In **Burnham vs. Interstate Casualty Company** (117 Michigan, 142), it was contended that the inferences deducible from the testimony were consistent with three theories as to the cause of death, namely, apoplexy, sudden seizure, and suicide, and therefore no one theory was proved. The Supreme court of Michigan disposed of that contention in these words:

"The testimony does not establish facts to overcome the presumption. Where death may be attributed to suicide, murder, accident or negligence, the presumption of law is against suicide and murder."

The text-writers adhere to the same opinion. In **Elliott on Evidence,** section 2391, the following is found:

"The presumption of law is always against suicide. This presumption is so strong that the courts usually require some evidence of an intention of suicide, as the intent is regarded as the gist of the act. This presumption against suicide is also strong enough to rebut the usual and natural inferences that might arise from conditions and circumstances ordinarily pointing to suicide. Thus, where the insured was found dead, lying on his back, with a pistol in his right hand which was lying across his breast,

and there was a pistol or gunshot wound in his right temple, this was held insufficient evidence of suicide. In all such cases the law presumes that the wound which caused death was the result of accident. This rule is carried to the extent that where it is evident that the death resulted from accident or suicide, and the evidence fails to show which was the cause, or where from all the evidence in the case the cause of death may be equally referred either to accident or intention, the law will presume that the death was accidental and not intentional. Where a body is found and there is no direct or positive evidence as to the cause of the death, the law will presume that it was caused neither by suicide or murder. And it has been held that where the evidence is equally balanced, or so nearly so as to leave the question in doubt, the finding should be against the theory of suicide. The presumption is that the death of the insured was not voluntary. The law presumes every person to be sane, and there is no presumption of insanity from the fact of suicide.

Continuing, with section 2392, the author says:

"As the presumption of law is against suicide and that proof of death is sufficient to entitle the plaintiff to recover, it follows naturally that the burden of proof is on the insurer to show by a preponderance of the evidence that the wound resulting in death was intentionally self-inflict-

ed. And this rule is not changed by the fact that the proofs of death stated the cause of death as suicide. Where a life policy provided that it shall be void in case the insured shall 'under any circumstances die by his own hand,' to bring the case within this proviso it was held that the burden was upon the defendant to establish intentional suicide.

Further, at section 2393:

"In establishing the fact of suicide some courts require the proof to be so certain and conclusive that reasonable men must necessarily infer from the evidence that the death was the result of design and not of accident. The element which distinguishes between accident and suicide is the question of intent. Hence where sucide is relied upon as a defense an important if not a controlling feature is as to whether or not the wound was inflicted with the intent to take life. The intention to commit suicide may be shown by proving declarations to that effect, but such declarations must be limited, in order to be admissible, to or near the time of the alleged act. They must be so near in point of time as to justify a reasonable probability, taken with other evidence in the case, that the insured carried his declared intention into execution. And it is held that suicide threatened or attempted, or actually committed, is competent evidence up-

on such an issue. And it is the rule that where the evidence is so clear as to exclude any other rational hypothesis than that of suicide, it is sufficient, the ordinary presumption against the fact of suicide will not be permitted to overcome or destroy such rational conclusion deducible from the clear and definite proof. In proof of suicide the location of the wound is important. Wounds or injuries inflicted for the purpose of self-destruction are usually upon the front or right side of the body.

And, finally at Section 2394, the learned commentator says:

"No definite or general rule can be stated as to the extent or degree of proof considered sufficient to establish the theory of suicide. It is evident that it must be sufficient to overcome the presumption against the voluntary taking of one's own life. And if the circumstances proved to establish the theory of suicide leave a reasonable hypothesis that death resulted in any other manner the evidence will be regarded as insufficient. A general rule might be formulated to the effect that the preponderance required of the insurer in order to overcome the proof and presumption against suicide must be such as to exclude with reasonable certainty any hypothesis of death by accident or by the act of another. Thus it was held insufficient to defeat an action on a policy, providing that it shall be void if the

assured shall die by his own hand, to prove the death was caused by taking poison, and that the insured was sane at the time, for the reason that if the poison was taken by mistake or unintentionally the claimant would be entitled to recover. And it has been held that proof of death resulting from insanity does not prove death by suicide. In the absence of other evidence if the proof shows death by insanity, the legal presumption is that it is a natural death from a natural cause and not from an act of self-destruction."

To summarize on this point. The burden of proof does not require the insurer to establish the fact of suicide beyond reasonable doubt, neither is a mere preponderance of evidence sufficient; but the theory of suicide to avail must be established by a fair preponderance of evidence, which is sufficiently cogent and convincing as to exclude, with reasonable certainty, every reasonable theory of death by accident, assassination, or negligence. As graphically stated by the supreme court of Virginia:—

"the burden of proof to establish such a defense is upon the defendant, he must make it out by clear and satisfactory proof—**no proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence of moral turpitude or crime.**"

Insurance Company vs. Hairston, 108 Va., 832;
128 American State Reports, 989, 1004.

Enough has been said to justify the assertion that the burden of proof in the instant case was properly imposed upon the Plaintiff in Error. The principles upon which this action is predicated have become axiomatic and there is a singular unanimity in their application. It seems very clear, therefore, that the demurrer was properly overruled; that there was no error in denying the motion of the insurance company for non-suit, either upon the ground that the beneficiary did not prove the cause of death or otherwise; and that the burden of proving self-destruction, the burden of bringing the cause of death of the insured within the exception or condition of the policy relied on. necessarily rested upon Plaintiff in Error.

III

The next group of alleged errors (Assignments IV and V), concerns the alleged error of the District Court in sustaining objections to certain questions propounded by plaintiff in Error to its so-called expert witnesses, namely, Doctor S. C. Gibson and Doctor S. K. Morrison.

Counsel is constrained to call attention to the fact that these alleged errors are not based upon correct premises, as an examination of the record will demonstrate.

(A) The first two questions included in Assignment IV, although ruled out in their stated form were in effect answered by the witness. Those questions appear in the printed Record at page 199. The learned trial Judge made certain suggestions to Counsel for Plaintiff in Error, which appear on pages 200 and 201 of the Record, from which the following is an excerpt:

> "The COURT: It is perfectly competent to ask this witness how such a wound might be produced, by what sort of instrumentality; whether it was a gunshot wound, or knife wound; and you can ask him whether, under ordinary conditions, a wound of that kind could be produced from some external source, without lacerating the lips or the tongue, or breaking the teeth, or things of that kind, and from those things the jury can draw the deduction you are asking this witness to state as an expert. It is not the subject of expert deduction."
>
> Record, page 201.

And Counsel for Plaintiff in Error availed himself of the suggestions of the Court and proceeded to ask the questions appearing on pages 201, 202, 203 and 204 of the printed record. Then after cross-examination of the witness (Doctor S. C. Gibson) had been commenced, distinguished Counsel for Plaintiff in Error, again adverted to the inquiry which was referred to in the former direct

examination, as shown on page 199 of the printed Record, and those questions were again put in the following form:

"Mr. HAWKINS: May I just ask one more question, your Honor?

"Q. Basing your testimony upon your experience and your examination of the deceased, Mr. Neasham, I ask you to state whether or not in your opinion the wound was produced by a near shot or one fired from a distance?

"Mr. KEPNER: That is objected to as incompetent; it has already been gone into.

"The COURT: There has been no foundation laid for him to express an opinion upon a question of that kind.

"Mr. HAWKINS: Notwithstanding it is admitted that he came to his death by a gunshot wound, your Honor?

"The COURT: That don't make any difference. You are asking a question now which involves the knowledge of this witness as to the effect of a gunshot wound produced from a distance as compared with one at close range; this witness has not disclosed any such experience.

"Mr. HAWKINS: He has testified he has been a physician for a number of years, and has had experience with gunshot wounds.

"The COURT: (Q) Have you ever had any experience which would enlighten your mind as to the distinctive effect of what counsel characterizes as a near shot or a far shot?

"WITNESS: No, unless it is powder burned.

"The COURT: Yes, of course; that is a different thing. The objection is sustained."

Record, pages 203, 204.

And distinguished Counsel for Plaintiff in Error did not even save an exception to that ruling; yet, with a **sang froid** worthy of a better cause, assigns the ruling to the same questions appearing on page 199 of the Record as error! (Compare the questions appearing on page 199, with that appearing on pages 203, 204.)

The witness disqualified himself to answer the questions, and was permitted under the ruling complained of to tell all that he knew regarding the matter in hand. The assignment of error and the argument of Counsel for Plaintiff in Error to the contrary notwithstanding, the only foundation for this alleged error (No. IV) is with reference to the last two questions quoted therein, which for convenience are hereinafter quoted.

(B) And with reference to Assignment No. V, the first question therein stated was reformed and finally answered, as is demonstrated from the following excerpt from the Record:

"Mr. HAWKINS: (Q) Doctor, you heard Dr. Gibson's testimony in describing the nature of the wound, and its location in the back part of the mouth of the deceased, did you?

"A. I did.

"Q. **Assuming that testimnoy to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?**

(See, Assignment No. V, Record, page 57.)

"Mr. KEPNER: I object to that as incompetent.

"The COURT: The objection is sustained. There is no foundation for such a question here.

"Mr. HAWKINS: If the Court please, counsel said awhile ago there was no proof that this death came from a gunshot wound; plaintiff has proved that herself.

"The COURT: I am not speaking of that. Your question does not involve any element of the magnitude of the missle that was fired by the gun, or anything else—it is just a gun; it might have been one calibre, or might have been another. **That is the unfortunate thing growing out of the fact that this autopsy was not carried to a point sufficient to fully demonstrate the instrumentality that produced the death, its cali-**

bre, and so forth, except by inference, which the jury must draw."

Record, pages 209, 210.

There was no exception saved by Plaintiff in Error to the ruling of the Court on the first question, which distinguished Counsel include in the alleged error No. V! Nor is that all.

Counsel reformed his question as follows:

"Mr. HAWKINS: (Q) Assuming the testimony of Dr. Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth and lips were not injured, would it in your opinion be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased?

"Mr. KEPNER: Objected to as incompetent.

"The COURT: I think so. The objection is sustained.

Mr. HAWKINS: We ask for an exception."

Record, page 210.

So, the ruling to which the exception was saved is not the ruling assigned as error. But the question was again reformed and finally answered:

"Q. Could, in your opinion, a gunshot wound

be inflicted upon the deceased, making the wound described by Doctor Gibson in his testimony, without injuring the tongue, teeth or lips?

"Mr. KEPNER: Same objection.

"The COURT: No, that is precisely the same question I allowed Dr. Gibson to answer; that is, whether under normal conditions, a wound of the character described could be produced—from external sources you mean, Mr. Hawkins?

"Mr. HAWKINS: Yes.

"The COURT: From external sources, upon the person of the deceased, without injuring the lips, tongue and the adjacent soft tissues, or the teeth?

"WITNESS: Shall I answer it?

"The COURT: Yes. He is asking you whether it could, under ordinary circumstances.

"A. No, it could not."

Record, pages 210, 211.

So, the first question included in alleged error No. V should be eliminated.

Whether the first two questions included in Assignment IV and the first question included in Assignment V was by inadvertance or with the intent to mislead is not for Counsel to determine;

suffice it to say that the only basis for Assignment of Error, numbered IV, is that the District Court sustained objection to the following questions propounded by Plaintiff in Error to its witness Doctor S. C. Gibson:

> "Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?
>
> Record, page 200.
>
> And the question was repeated,—
>
> "Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself, or by another?"
>
> Record, pages 202, 203.

Whilst the only foundation in the record for Assignment of Error, numbered V, is with reference to the last question included therein:

> "Q. Assuming the testimony of Doctor Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?"
>
> Record, page 211.

Of course, those questions were wholly incom-

petent; The learned trial Judge, in sustaining objections to this character of inquiry, had used this language:

"The COURT: The jury is composed of sensible men; they are competent to form judgments and draw deductions; you can lay before the jury the facts, and argue to them your theory as to how this wound was produced, and they will draw their conclusion, but it is not the subject of expert testimony to ask the witness, however well versed in surgery or medicine he may be, as to whether a given wound was more likely to have been produced upon a person by the individual himself, or a third person."

Record, page 200.

The adjudicated cases upon the precise point sustain the ruling complained of. In **Manhattan Life Insurance Company vs. Beard** (66 Southwestern Reporter, 35), the Supreme Court of Kentucky had before it a case where the trial court had allowed the character of inquiry here complained of, and in reversing and remanding the case for a new trial, the Court said:

"The circumstances about the death of the insured were such as to admit the theory of suicide. It might, though, have been an accident. On the trial a physician, introduced as an expert on the subject of insanity, after testifying about the indication of certain symptoms of insanity,

and in his opinion, if the deceased showed these symptoms, he was insane, was asked whether, in his opinion, the death was the result of accident or design, and was permitted to answer. This was error. The witness did not see the body, nor was he in attendance on his sickness. It was competent for him to say what was the probable effect of certain drugs, and what state of mind as to sanity or insanity certain symptoms would indicate; **but whether the act of the deceased in taking the drug was by design or accident was not the subject of expert testimony. That was an issue to be solved by the jury upon all the evidence."**

In **Aetna Life Insurance Company vs. Kaiser** (115 Kentucky, 539; 74 Southwestern Reporter, 203), the Court had before it a case where the insured had met his death in his own room from a gunshot wound, and the precise questions in effect, as those which form the basis for alleged errors IV and V had been ruled out by the trial Court.

The Supreme Court of Kentucky said:

"The coroner, who was a physician, was introduced as a witness, and after detailing the appearance of the body as found by him, was asked by appellant whether, in his opinion, the death of the insured was self-inflicted or not. We hold that the opinion of the witness as to the manner of the death of the insured was not a relevant

fact. **Expert evidence is not admissible to decide disputed questions of fact**—to establish by the opinion of expert witnesses whether the act under investigation occurred in this way or that. That was the exact question to be determined by the jury from all the facts and circumstances."

So there, so here, the contention urged by Plaintiff in Error is wholly untenable. The two questions propounded to Doctor Gibson, and the one question to make the Record, repeated to Doctor Morrison involved the whole issue to be determined by the jury from all of the facts and circumstances in evidence,—How and by whom was the death wound or wounds inflicted? It is not within the province of expert witnesses, however well versed in surgery or medicine they may be, to determine such issues. That function belongs to the jury upon all of the evidence. **(Furbush vs. Maryland Casualty Company,** 131 Michigan, 234; 91 Northwestern Reporter, 135; 100 American State Reports, 605). The ruling complained of was entirely proper and should be sustained (2 Jones' Commentaries on Evidence, Sections 372, 373). In **Ferguson vs. Hubbell** (97 New York, 507, 49 American Reports, 544), Earl, J., speaking for the Court, said:

"The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases

where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgment of unskilled jurors than the opinions of hired and generally biased experts."

In the administration of criminal justice it has sometimes been held that there are exceptions to the general rule above stated, and such are the character of the authorities cited by Plaintiff in Error. For example, the case of **Miller vs. State,** (131 Pacific Reporter, 721), the indictment was for murder, the immediate cause of death being strangulation, and the trial court had permitted a question as to **whether or not the instrumentality of death could have been applied to the throat of the deceased by the victim herself.** The Court said:

"In prosecutions for murder, the testimony of medical experts, as to the cause and manner of death of the deceased, may be indespensible. The case at bar is an illustration of this. Very few persons have any knowledge or experience with reference to death caused by strangulation. Without the testimony of medical experts,

the jury would have been entirely in the dark on this subject."

And the Court quoted with approval from the case of **State vs. Lee** (65 Connecticut, 265, 27 L. R. A., 498, 48 American State Reports, 202), where the indictment was also for murder, in the performance by a doctor of an abortion upon the person of the deceased; the injury was to the uterus. **Expert testimony as to whether the injuries could have been inflicted by the victim herself was held admissible.** But there is a wide difference between that character of interrogatory and the bald questions propounded by distinguished Counsel for Plaintiff in Error in the instant case! The contention urged as error is wholly untenable. The Record discloses no foundation for any such questions as the ones excluded by the District Court. The authorities cited by Counsel do not sustain their contention.

IV

Complaint is made in alleged error numbered VI that testimony was admitted over the objection of Plaintiff in Error regarding the conditions immediately surrounding the scene of the homicide. The witness A. A. Burke, during the preceding ten years, had been a special officer for Wells, Fargo & Company, Chief of Police of Reno; Sheriff of Washoe County; Inspector and Superintendent of

the Nevada State Police. The Record shows him to be an experienced and intelligent officer. He was Superintendent of the Nevada State Police at the time of the death of the insured; he visited the scene of the tragedy, the day following its occurrence, and made a thorough examination of the locus in quo. Speaking of a point about a 100 to 125 feet from the place where the body of the insured was found, the witness said:

> "I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down."
>
> Record, page 235.

To give color to this assignment of error it is urged that "it was not shown or attempted to be shown that the place was in the same condition that it was on the day insured came to his death."

> Record, page 58.

Doubtless that assertion was made through inadvertance; at any rate, the fact is that Plaintiff in Error had previously shown, through its star witness Charles P. Ferrel, that **"the condition of things at the time the body was found there" were the same three or four days after the tragedy** (Record, page 153), so it would seem that the beneficiary (Defendant in Error), in her rebut-

tal, had the right to assume that the condition of things were the same on the day following the homicide.

Where it is sought to establish the theory of suicide by circumstantial evidence, every circumstance surrounding the tragedy should go to the jury. How and by whom was the death wound inflicted? In the effort to throw light on this question, it was certainly competent, in rebuttal, to show that others may have been skulking in the vicinity at or about the time of the violent death of the insured, especially in view of the fact that the defendant Company, in the attempt to show self-destruction, had brought out the fact that there were four or five persons in the immediate vicinity, at or about the time the death wound was inflicted upon the insured. The witness Charles Brown, had testified, as follows:

"Q. How many of you were there?

"A. There was three and a man named Mr. Rudolph and Mr. Huntsman."

Record, page 118.

In **Kornig vs. Western Life Indemnity Company** (102 Minnesota, 31, 112 Northwestern Reporter, 1040), Mr. Justice Jaggard, speaking for the Court said:

"The second group of assignments of error concerns the alleged error of the trial court in

receiving the photographs of the rear of the premises in evidence, showing, **inter alia,** a stairway from the second floor to the ground. The basis of the objection is that the reception simply served to emphasize in the minds of the jury the gauzy suggestion of robbery as a motive for the unproved and otherwise unimaginable murder, by showing a possible mode of escape for the murderers from the premises. It is obvious that any testimony showing the condition of the premises and of means of access to and egress from the place where the deceased died was relevant."

And the monographic note to Metropolitan Life Insurance Company vs. De Vault (17 American and English Annotated Cases, 35), is to the same effect.

V

In alleged error numbered VII, complaint is made that the testimony of Charles P. Ferrel given at the inquisition upon the body of the insured was used upon the trial of this case to impeach said witness. It appears that the testimony taken before the coroner was stenographically reported, under the direction and certificate of the coroner, and by said official filed in the office of the County Clerk of Washoe County, Nevada, pursuant to Section 7550 of the Revised Laws of Nevada, which provides that

"The testimony at such inquest shall be reduced to writing by the justice of the peace, acting as coroner, or as he may direct, and by him, without delay, filed in the office of the Clerk of the District Court of the County."

This statute was adopted by the Nevada Legislature in 1912; it was copied, practically verbatim, from Section 1515 of the Penal Code of California, which provides:

"The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner or under his direction, and forthwith filed by him, with the inquisition, and all recognizances taken by him, in the office of the County Clerk."

And at the time of its adoption in Nevada, this California statute had been construed as follows:

"Testimony of witnesses at coroner's inquest taken in writing, and returned to District Court, was properly taken and preserved so as to render it admissible in evidence in prosecution for murder of person on whom inquest was held for purpose of impeachment and conviction, after proper foundation had been laid. People vs. Devine, 44 Cal., 452, 459; People vs. Lambert, 170 Cal., 170; 50 Pac. Rep., 307."

Kerr's Cyclopedia Codes of California, volume 4, page 1364 and note.

In **O'Brien vs. Trousdale**, decided by the Supreme Court of Nevada, October 11, 1917 (165 Pacific Reporter, page.....), Mr. Justice Coleman, speaking for the court, said:

> "It would seem that an additional reason exists for this court to adopt the view of the California Court, and that is that both our constitutional and statutory provisions relative to the writ of prohibition were taken from California and our statutory provision was enacted sometime after the decisions in California cases were rendered. **In the light of this fact, I think we must assume that our legislature intended to adopt the California statute as construed by the highest court of that state.**"

It seems manifest that the purpose of the legislature of Nevada in adopting Section 7550 of the Revised Laws in 1912 was to protect interested parties from the methods which seem to characterize Plaintiff in Error in this case. That variant statements made before a coroner's jury, properly preserved, may be used upon the subsequent trial of an action growing out of the inquisition upon the body, to contradict, impeach, or even convict of murder is a matter of Horn Book knowledge. In Encyclopedia of Evidence, under the title Impeachment of Witnesses, the following is found:

> "Any statement of a witness variant from the statements of his that are given in evidence on

the trial, may ordinarily be put in evidence to impeach him by a person entitled to do so, on the conditions hereinafter set forth. * * * The form and occasion of a witness' variant statements do not ordinarily affect their admissibility. Thus statements made by a witness when testifying on a former trial of the same action, **or an altogether different proceeding, as an examining trial, a coroner's inquest, an inquiry before a grand jury, or an examination on proceedings supplementary to execution. The fact that the former proceeding was between different parties from the present does not affect the admissibility of the witness' variant statements given therein."**

7 Encyclopedia of Evidence, 54, 57.

So, the statement of Counsel for Plaintiff in Error that "There is no statute providing that such testimony taken before a coroner shall be evidence in any proceeding of any nature or kind whatsoever" is not really entitled to much credence.

Nor is this all!

The record shows that the transcript of proceedings at the inquisition upon the body of the insured was used by both parties at the trial of this action, and without objection.

Record, pages 114 to 123, inclusive.

Nor was there any objection to the use of such

transcript on the cross-examination of the Witness Ferrel, as the following excerpt from the Record demonstrates:

"Mr. KEPNER: (Q.) Did you testify at the coroner's inquest in Reno on the occasion when you say you delivered this gun to Mr. Unsworth?

"A. I did.

"Q. And you were asked about this gun at that time?

"A. I was.

"Q. I will get you to state whether you were asked this question by the District Attorney:

'Q. Did you take the gun? To which you answered, 'Yes, sir, I picked the gun up?'

"A. I did.

"Q. Then you produced the gun; and then you were asked this question, referring to this same pistol, 'Is this in the same condition as it was?' to which you answered, 'No, I removed the shell from the chamber, and there are nine shells in the magazine.'

"A. Well, you are getting two questions together.

"Q. The question and your answer: The question is: 'Is this in the same condition as it was?' to which you answered, 'No, I removed

the shell from the chamber, and there are nine shells in the magazine.' Did you so testify?

"A. It is compounded in two questions.

"The COURT: No, he is reading to you what occurred at the coroner's inquest He is simply asking you if you gave that answer at the coroner's inquest. Read it to him again.

"Mr. KEPNER (Reading): 'Is this in the same condition as it was? A. No, I removed the shell from the chamber, and there are nine shells in the magazine.'

"Q. Did you so testify?

"A. **I made the answer to two questions."**

The record, therefore, does not sustain the statement in the alleged error, numbered VII, "said witness having previously testified * * * that he did not give the testimony attributed to him;" on the contrary, the witness expressly admitted giving the testimony referred to. Whether he gave it in response to one question or to two questions is beside the point. Moreover, the Record (see pages 165, 166, 167) shows no objection to the use of this transcript on cross-examination.

Attention is now invited to the following:

"Mr. KEPNER: If your Honor please, I offer in evidence lines 15 to 28 inclusive, page 7, of the

duly authenticated transcript of proceedings entitled 'In the matter of the Inquisition upon the body of William C. Neasham, Deceased,' which, under the Statute, was filed in the office of the Clerk of the Second Judicial Court of the State of Nevada, in and for the County of Washoe, and by him duly certified as being a true and correct copy of that transcript; the matter referred to being a portion of the testimony of Charles P. Ferrel, given at the inquest." (Objected to as incompetent.)

"The COURT: This is simply for the purpose of impeachment, I suppose?

"Mr. KEPNER: That is all.

"The COURT: You may read that part that relates to the testimony you offer; it is only those parts you asked him about, and it is purely for impeachment.

"GENTLEMEN OF THE JURY: You will bear in mind, if I should neglect to state to you, when I come to charge you, that this evidence is not introduced as being the truth of what may have been there represented, but simply as bearing upon the question whether the witness under examination has at some other time testified differently from what he testified here; that is the only purpose; it is for the purpose as we term it in law, of impeachment; in other words,

to lay before a jury so that they may determine how far a witness is to be believed, because that is their province.

"Mr. HAWKINS: Your Honor overrules the objection?

"The COURT: Yes.

"Mr. HAWKINS: I desire an exception.

"Mr. KEPNER: I read the portion of the testimony of Charles P. Ferrel appearing on page 7 of the transcript, beginning with line 15 (Reads:) 'Q. By Mr. Lunsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. Is it here now? A. Yes, sir, this is the gun. Q. Is this in the same condition as it was? A. No, I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now? A. Yes.'

"Mr. KEPNER: That is the portion which I read to the witness, your Honor."

Record, page 252.

Now when the jury returned into Court and asked to have certain testimony read, what was it

which was in fact re-read to the jury? Page 302 of the printed record shows, beyond any question that it was the cross-examination of the witness Charles P. Ferrel, appearing on pages 165, 166, which was re-read to the jury, not page 252 as the Assignment of error and argument of Counsel thereunder would apparently imply.

So, Plaintiff in Error is mistaken in asserting in this alleged error (No. VII) that "there is no statute authorizing the use of such testimony"; and is unfair in stating the manner in which the testimony referred to was used. No possible error could have resulted under the admonition of the Court given to the jury at the time the testimony was introduced.

Record, pages 251, 252.

The assertion of Counsel to the contrary, notwithstanding, it seems very clear that the testimony was competent for the purposes of impeachment under Section 7550 of the Revised Laws of Nevada, as well as under the general rules of evidence on the subject of impeachment of witnesses.

VI

Assignment of Error No. XI challenges that portion of the instructions of the Court to the jury which relates to the question of accident. It contains the following statement of the pleadings:

"In that it appears from plaintiff's complaint, plaintiff's reply and defendant's amended answer that the insured came to his death from a gunshot wound—the defendant alleging in its amended answer that the insured came to his death as the RESULT OF A SELF-inflicted gunshot wound, while plaintiff in her reply alleges that the insured 'came to his death on the 27th day of February, 1915, from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff;' the issue, and only issue, of fact being whether or not the insured destroyed himself by gunshot wound as maintained by the defendant, or whether the insured came to his death from a gunshot wound inflicted upon him at the hands of some person or persons other than insured, as maintained by plaintiff; there was no issue of accident, mischance or grounds under the pleadings for the jury to speculate or theorize and the charge to the jury above set forth, permitted the jury to find for the plaintiff upon a theory of the case which was not in issue as made by the pleadings."

Record, page 66.

The assignment is not based upon correct premises; the statement, as shown by the foregoing excerpt, omits a very important averment in plaintiff's replication; and, if it be true that "the greatest falsehood is that which contains the largest

element of truth," then this assignment is unfair and misleading. The omitted paragraph of the Reply is in the following language:

> "II. Plaintiff denies that either during the first insurance year, or either on the 27th day of February, 1915, or at any other time, said William C. Neasham, either destroyed himself, or either then or there died as the result of a self-inflicted gunshot wound, and in this behalf plaintiff alleges that her husband, William C. Neasham, the insured named in said contract or policy numbered 4707986 came to his death on February 27th, 1915, **at the hands of some person or persons unknown to plaintiff.**"
>
> Record, page 14.

This is an allegation of ultimate facts broad enough to admit evidence of any character of injury, whether the instrumentality were a bludgeon, knife, bull-dog pistol, or other weapon, and therefore broad enough to include the theory of accidental, that is, unintentional injury. Doubtless, Plaintiff in Error at the proper time and place, might have required a more specific allegation but no such effort was ever made. Moreover, from the opening statement of counsel for the beneficiary (Defendant in Error) in the Court below, the following excerpt is made:

> "Mr. KEPNER: If your Honor please, the

position I take is, in order to maintain and establish the case, is proof of the facts which I have outlined.

"The COURT: Well, perhaps you are right about that. You see, it is not admitted that the deceased died, so your evidence will have to show his death, and that will involve showing the means by which he died.

"Mr. KEPNER: Showing that he died?

"The COURT: Yes.

"Mr. KEPNER: I think, if your Honor please, we are anticipating just a little, perhaps. Under the terms of the policy, death is the only thing we have to prove; and we will prove death. I might state, in order that the jury may understand the form that this controversy will take, that the defendant, as I understand it, will contend that the insured died by his own hand, or by his own act; the plaintiff on her part, will contend as to that point that **the insured came to his death at the hands of some person or persons unknown—some person or persons other than the insured.**"

Record, page 75.

And at no time was the cause of death limited by the beneficiary (Defendant in Error) to a gunshot wound. The record shows no such limitation. Whether the misstatement of the pleadings in the

assignment referred to is by accident or design is not for Counsel to determine.

THE THEORY OF ACCIDENT WAS NOT ELIMINATED:

The presumption is always against crime. Neither homicide nor suicide can be presumed. "The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact," (O'Rear, J., in Aetna Life Insurance Company vs. Milward, **Supra.**) The presumption is likewise against murder, or the intentional taking of the life of another. Accordingly, if the evidence be such as to warrant the inference either of suicide, murder or accident, the presumption is in favor of the latter (Starr vs. Insurance Company, 4 L. R. A., new series, 636); whereas, if the circumstances are consistent with either suicide or homicide, the presumption that death was due to accident is conclusive (Jenkin vs. Pacific Mutual Life Insurance Company, **supra**); in such case, the question must be left to the jury to determine as between those possible theories (Aetna Life Insurance Company vs. Milward, 4 American and English Annotated Cases 1092.) In other words the burden rested upon the Insurance Company (Plaintiff in Error) to exclude with reasonable certainty every reasonable theory as to the cause of death, except suicide, before a verdict as to that cause would be justified; and (whilst the

authorities cited and discussed in the II division of this Brief and Argument deal largely with the presumption against suicide, they are understood as forming a part of the argument at this point), there is another line of cases holding that the theory of accident was not eliminated, even where it had been made clearly apparent that the insured shot himself, and the State and Federal Courts have declined to interfere with the verdict of the jury. A few of those decisions will now be briefly reviewed:

In **Home Benefit Association vs. Sargent** (142 United States, 691), the following sinister facts and circumstances were unsuccessfully urged as a reason for reversal of the judgment:

> "The facts in this case are thus stated in the charge of the Court to the jury, and there was no exception to such statement: 'It appears to be undisputed that Edward F. Hall had lived about twenty years of his life in San Francisco. He frequently—habitually, perhaps—carried a pistol. He sometimes, during his life, kept a pistol under his pillow. He was a man of genial, sanguine temperament, hopeful, making plans as to the future, proud of his only son. But it also appears that for a long time he had been suffering from severe headache—to such an extent that it created depression so strong, at times, that the doctor describes it as melancholia. It appears that on the evening prior to

his death he was with a party of friends at the residence of Mr. Robinson, and there in the presence of two or three witnesses complained of suffering intense pain in his head, frequently placing his hands to his head and complaining of the severe pain which he suffered. The pecuniary circumstances of Hall have not been disclosed here, further than the evidence as to borrowing money of his sister. It is proof that he had a wife and son,—his son in college. But it is also proper that I should call your attention to the fact that at the moment of his death his wife was seriously ill—in a distant city. Upon the morning of the 19th of October, 1886, at 139 East 21st Street, in this city, and between 7 and 7:30 o'clock of that morning, Edward F. Hall was found in the back-hall bedroom of the fourth story, with a severe wound in his right temple. The wound was so severe that it caused a comminuted fracture of the frontal bone and fractures radiating up and down and backwards from the hole in the right temple, sufficient, unquestionably, to produce his death. He was found lying upon his bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle having taken place, and near his right hand, within a few inches or very near it, was the pistol, probably, which has been shown in your presence, with three of the chambers discharged. There was also found upon his stand or desk a letter to his physician, in

substance stating that he had been suffering terribly with headache, that he had had it for several days, that it is growing worse and has become well-nigh unbearable."

In **Boynton vs. Equitable Life Assurance Society** (105 Louisiana, 202; 52 L. R. A., 687), the following pertinent observations appear:

"We are informed that he was an active and industrious man, kind and affectionate to his children, who, in return, felt the regard and affection due him. He was not annoyed by debt, or anything else which would have a tendency to embitter one's life. This suit proves that he had at least one brother in addition to his children, for whom he must have entertained regard. While, as a self-respecting man, he was doubtless greatly annoyed by the charges brought against two of his brothers that was not of itself enough to drive a man to extreme desperation. Sometime had elapsed since the charges had been brought against these two brothers, during which he did not refer to them as cause which was driving him to the commission of such an act as suicide. We are of the opinion that our decree is amply supported by the decisions in Leman vs. Manhattan Life Insurance Company, 46 La. Ann., 1189; 24 L. R. A., 589, 15 Southern Reporter 388, and in the case of Denechaud vs. Trisconi, 26 L. Ann. 404. The evidence

does not exclude the theory that the death was accidental."

In **Kornig vs. Western Life Indemnity Company** (102 Minn., 31, 112 Northwestern Reporter, 1039), the facts as stated by the Court were that:

"The deceased was a man of cheerful disposition, living happily with his family, a kind father and devoted to his children. He had been moderately successful in business, and immediately before his death was in possession of a considerable sum of money, amounting to several thousands of dollars. There was testimony to the effect that he had slept and lived at home, and got his meals at home, where he had all his things, including his clothing; that his wife had seen him on the day of his death and daily for sometime before; but it further appeared that from the first day of March up to the 12th day of April, the day of his death, he had had a room rented in a house in Minneapolis. There was evidence tending to show that on the day of his death he had had trouble with the woman of the house where he had the room, and that he had shot her; that she ran into the street for assistance and that thereupon the officers entered the premises and found deceased dead upon the floor."

As further stated by the Court:

"He was lying on his left side with his left

cheek on the floor, his left arm beneath the body, the legs bent at the knees and drawn up, and the right arm so that the hand was on the leg. Loosely gripped in the hand was the revolver, the muzzle of which projected between and below the legs, so that it was visible to one standing in the doorway. In the right side of the head was a bullet wound, about an inch and a-half back of the ear. The trend of the bullet was backward and downward. Two or three cartridges remained in the revolver which was of a 38 or 32 calibre. Two or three empty cartridge shells had been extracted from it. Only a small amount of money and some papers were found on the person of the deceased. No one was found in the building in anywise connected with the death of the insured. The testimony of the unfortunate woman who was shot consistently maintained that deceased shot her; but she did not say that she saw deceased shoot himself. She emphatically denied having maintained any illicit or improper relations with deceased. There was no testimony that she called for help. She did nothing to cause the apprehension of her assailant. Her narrative as to what occurred immediately preceding the shooting varied at times. More specifically, she told the dressmaker who occupied the first floor of the building that at the time she received the shot she was looking into a drawer in the dresser for a present of which he had told her, and that

while stooping over she received the shot. This she denied in her deposition."

Upon these facts the Supreme Court of Minnesota said:

"The defendant insists that the testimony demonstrated that this was a case of suicide—pure and simple. The law on this subject is well settled. There is little controversy as to its formula and a singular unanimity in its application. Many cases have been cited and analyzed by both counsel. Their discussion here would serve no useful purpose. * * * That insurance companies rarely succeed in sustaining this defense is, in its proper sense, no criticism upon the law or the rules laid down by the courts. The difficulty is inherent in the subject-matter. Men do not ordinarily commit suicide, and when they do they seek conditions of secrecy. Proof of death by suicide is naturally hard to be had. In Lindahl vs. Supreme Court, I. O. F. (Minn.), 110 N. W., 358, Mr. Justice Elliott has thus summarized the rules generally accepted on this subject: Where the defense of suicide is asserted against an action by a beneficiary on an insurance policy '(a) The burden of proving that the deceased committed suicide is upon the defendant; (b) The presumption is against suicide; (c) If the known facts are consistent with the theory of natural or accidental death, the presumption which the law

raises from the ordinary motives and principles of human conduct requires a finding against suicide; (d) When circumstantial evidence is relied on, the defendant must establish facts which preclude any reasonable hypothesis of natural or accidental death.' **It is the defendant who must, when circumstantial evidence is relied on, establish such facts as preclude the hypothesis of natural, violent, or accidental death. The burden of proof does not rest on the plaintiff to establish such facts as demonstrate or justify the theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide.** It is not material that 'there was not enough evidence to say that murder was done.' O'Rear, J., in Aetna Life Insurance Company vs. Milward, 82 S. W., 364, 365 (and see cases collected at page 366), 118 Ky., 716; 68 L. R. A., 285. Moreover, where the cause of death is in doubt, there is a presumption of law against death by suicide. It is true that there is a corresponding presumption against death by crime. The result of the rule in such a case as this is, as has been well said by Cassoday, C. J., in Rohlof vs. Aid Ass'n. (Wis), 109 N. W., 989, 991: 'Can it be said as matter of law that the inference or conclusions to be drawn from such facts are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that the deceased intentionally shot himself?' It is to be noted that this

case was decided subsequently to Agen vs. Met. Life Ins. Co., 105 Wis., 215, 80 N. W., 1020, 76 Am. St. Reps., 905, to which defendant refers us."

In **Fidelity & Casualty Company vs. Love** (111 Federal Reporter, 773), the facts are sufficiently indicated in the discussion of their effect by Mr. Circuit Judge Selby, speaking for the Circuit Court of Appeals, sustaining a judgment for the beneficiary, where he says:

"Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partially dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that had passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show almost, if not quite conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting. Whether it was accidental or intentional was a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. The evidence is presented

in detail and at length in the record, and it would serve no useful purpose to state it. In a case very much like this one in many of its features, the Supreme Court has recently held that the trial court did not err in submitting the question of suicide to the jury. Supreme Lodge vs. Beck, 181 U. S., 49."

In **National Union vs. Fitzpatrick** (133 Federal Reporter, 694), the circumstances surrounding the death of the insured, as stated by the Court, were far more sinister and indicitive of self-destruction than in the instant case, yet they were unsuccessfully urged against the judgment of the beneficiary. The facts as stated by the Court, were:

"David Fitzpatrick, the assured, was found dead in one of the rooms of the Commercial and Industrial Association, a social organization in the city of Montgomery, between 5 and 6 o'clock in the afternoon of December 3, 1900. The deceased, Fitzpatrick, went into the rooms of the Commercial and Industrial Association between 11 and 1 o'clock, probably near noon. Soon after going to the rooms of the Association, he appears to have gone into what was called the committee room—a small room used for committee meetings, in which there was a telephone. The first thing Fitzpatrick did after going into the room was to use the telephone. After this he was seen by an employee of the association several times, sitting in a chair, with his feet in an-

other chair, apparently asleep. Between the hours of 5 and 6 o'clock, Vickers, the employee who had frequently seen deceased sitting in that position during the afternoon, informed Gilbert, the secretary of the association, that Fitzpatrick had been in that attitude a long time; and thereupon Gilbert opened the door of the Committee-room, which was closed, but unlocked, and found that Fitzpatrick was dead. The hands of the deceased were lying in his lap. They were not folded, but in his right hand was a pistol. There was an overcoat over his lap. There was a wound in the left breast of the deceased. He had apparently been dead several hours."

In addition to these sinister circumstances, the record further discloses that the insured was in financial difficulty, being short in his accounts, he was threatened with arrest and prosecution for embezzlement of funds from the Standard Oil Company, a corporation in whose employ he had been. Speaking of these circumstances, the Court said:

"The main question here is whether, under the evidence in this case, it was the duty of the Court to have directed a verdict in favor of defendant. Did the evidence require such a verdict and no other, or was the case such that the Court was justified in submitting it to the jury for determination? * * * The plaintiff having shown the death of Fitzpatrick, and the defendant

claiming that the cause of death was one excepted from the operation of the policy or benefit certificate, it was incumbent on it to show, to the reasonable satisfaction of the jury, this fact. * * * Under the evidence in this case, 'It is impossible to say that, beyond dispute' Fitzpatrick committed suicide. If it were necessary to do so, much could be cited from the evidence in favor of the fact that Fitzpatrick did not intentionally kill himself. He was a young man, apparently in good health, happily married. His relations with his wife and with her family, they all living together, appear to have been excellent. However this may be, and in any view of the facts, they were not such, in our opinion, as to require the Court to direct a verdict in favor of the defendant."

In **Supreme Lodge vs. Beck** (181 U. S., 49), the insurance company, also, resisted payment of its contract on the plea of suicide. The insured was killed by the discharge of a shotgun at the time held in his hands; the coroner's jury found that he had died "by shooting himself in the head with a double-barreled shotgun, with the purpose and intent of committing suicide"; and consequently the case was strenuously contested. The circumstances surrounding the death were as a matter of first impression extremely unfavorable to the beneficiary and yet they were unsuccessfully urged against the judgment in favor of the beneficiary.

Mr. Justice Brewer, writing the opinion for the Supreme Court showing that the evidence was not inconsistent with the theory of accident, thus summarized the situation:

"Whether the deceased committed suicide was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the insured committed suicide. The following are the facts, at least, from the testimony, the jury was warranted in finding them to be the facts: The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic who had worked in the family for two or three years, but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily his reply was that a man that had as much trouble as he had, the sooner the end came the better, and a similar remark at another time, that such a man 'would be better off dead than living.' Two days before his death his wife left him and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking.

There were two guns in his house, one a single-barrel shotgun, belonging to his wife, and one a double-barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying that he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hackdriver, who had brought the policeman, called out that the deceased had gone into the backyard and into the closet, and after a minute or so heard him step outside and immediately the gun was discharged, and on examination he was found with the upper part of his head shot off. It was so dark no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been

had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under these circumstances, it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from an intentional act. At any rate the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the court of appeals, we are not justified in disturbing it."

In **O'Conner vs. Modern Woodmen of America** (Minn.), 25 L. R. A., new series 1244, the facts and circumstances surrounding the death of the insured were such as to admit the theory of suicide; but, it might have been an accident. The following excerpt is taken from page 1248 of the selected reporter:

"Self-destruction also rendered the benefit certificate void and of no effect, and it is urged by defendant that the only conclusion to be drawn from the evidence and the circumstances

surrounding the death of the insured is that he committed suicide. A careful consideration of the record leads to the conclusion that the learned trial court properly submitted this question to the jury. At the time the insured became a member of the society he was, and for a considerable time prior thereto had been, a section foreman on one of the railroads leading out of Duluth. His family consisted of himself, wife, and three children. He was thirty-six years of age, and had been married about twelve years, and so far as the record discloses his family relations were uniformily pleasant. He was of a jovial disposition, industrious, and, with the assistance of his wife, had accumulated in the neighborhood of a thousand dollars, which was on deposit to his credit in Duluth banks. A day or two before his death he was discharged from his position as section foreman by the roadmaster, because of dissatisfaction with his work; but the evidence is reasonably clear that this did not disturb him, and he proceeded about his affairs as though nothing of the kind had taken place. There is some intimation in the evidence that he was not anxious to retain that position, and that he had been looking for a situation elsewhere. On the day of his death he went to Duluth in the morning, where he made some purchases for his wife and children, returning home in the afternoon or evening in his usual spirits.

A large party was had at his residence on that evening, at which a number of neighbors appeared, and music and dancing were indulged in until about eleven o'clock at night. He planned with one of his friends to go hunting the next day, and before retiring for the night he arranged his materials, and made all plans for leaving the house at 3 o'clock in the morning. He owned a rifle and also a revolver. The latter was kept upon the clock shelf in his sleeping room. With all his plans made, and the party dispersed, he retired in the room with his wife. His wife went to sleep, but later on was awakened by the discharge of the revolver in her room, and, arousing herself, found that her husband had been shot in the forehead and was dead. When discovered he was lying upon his back; one hand extending out over the edge of the bed over a slop jar, into which the revolver had fallen. Whether he had clothed himself ready to start on the hunting trip is not disclosed; nor does it appear whether he took the revolver to bed with him, or when he got hold of the firearm. It may have been under the pillow during the night. We are not advised by the evidence. At any rate, it is clear that, either through accident or design, he shot himself. When the coroner arrived the next day, the wife said to him that in her opinion her husband had shot himself, and she later made the same statement to others. No living person witnessed the shooting, and whether it

was accidental or purposely done by deceased can only be determined from the facts and circumstances disclosed by the record."

Commenting on these facts, the Court said:

"The evidence tending to show that the shooting was the deliberate act of deceased is not so conclusive as to justify interference with the verdict. The presumption is against suicide, and the burden was upon defendant to prove the contrary by a fair preponderance of evidence. And, though some evidence points to self-destruction, other items clearly negative that theory. We discover in the record no motive, no cause which might have prompted insured to deliberately take his own life. He had no family trouble no despondency or brooding over other trouble, and was not in want or necessitous circumstances. His drinking had not been of such a nature as to impair his health or faculties, and from the record no sufficient reason can be assigned in support of defendant's contention that the jury ought to have found that he deliberately took his own life. The opinion of his wife that such was the fact was clearly not controlling. She was greatly disturbed at the time of the shooting, and for several days subsequent to the tragedy, and her opinion is of no greater force than that of any other person, based upon the facts here before the Court. We are not advised that any other facts than those

disclosed by the record were made the basis of her opinion. The question was for the jury."

In **Metropolitan Life Insurance Company vs. De Vault** (17 American and English Annotated Cases, 27 at page 31), the following is found:

"The defense of suicide, to avail, must show that every hypothesis of accidental death is excluded by the evidence. * * * The burden of proving the defense of suicide was on the defendant. * * * Where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident. * * * Standard Life Insurance Company vs. Thornton, 100 Fed., 582. In the case last cited it is said: 'Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide.' "

There are other interesting cases to the same effect that might be referred to (17 American and English Annotated Cases, 32; Modern Woodmen vs. Kincheloe, 175 Indiana, 563; 28 American and English Annotated Cases, 1259, 1262); but the decisions in any manner militating against the authorities cited in this Brief are as "scarce as hen's teeth." The case of **Agen vs. Metropolitan Life Insurance Company** (105 Wisconsin, 217; 80 Northwestern Reporter, 1020, 1022), cited by the Plain-

tiff in Error, is hardly authoritative. There is a strong dissenting opinion, written by Mr. Justice Winslow and concurred in by one other member of the Court, and from that dissenting opinion, the following excerpt is taken:

> "I respectfully dissent in this case, because I think the circumstances shown by the evidence are fully as consistent with the theory of accidental shooting as with the theory of suicide, and, if such be the case, the law is well settled that the legal presumption is against suicide and must prevail."

(See, 80 Northwestern Reporter, page 1023.)

So far as the research of Counsel discloses this is the only case on the subject, where a Supreme Court has violated the rule:

> "If reasonable men, in weighing the evidence, might honestly differ in their conclusions as to whether decedent committed suicide, the verdict should stand."

(28 American and English Annotated Cases, 1260).

And, it is some satisfaction to call attention to the fact that whatever value the case may ever have been entitled to, it has been greatly weakened by the subsequent decisions of the supreme court of that state; for instance, in the case of **Rohlof vs. Aid Association** (109 Northwestern Reporter, 989,

991), the Supreme Court of Wisconsin, in sustaining a judgment for the beneficiary, used the following language:

> "Can it be said, as a matter of law, that the inferences or conclusions to be drawn from such facts and circumstances are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that deceased intentionally shot himself? If that is not so, the verdict of the jury is sustained by the evidence, and the trial court properly refused to set it aside and grant a new trial."

Enough has been said to justify the assertion that where the circumstances leave it doubtful whether the insured met his death by his own act or by the act of another, the presumption in favor of death by accidental means is controlling; and according to the great weight of authority the presumption in favor of accident is conclusive where it is clear that the act resulting in death was by the insured himself, and there is nothing from which it can be determined whether the act producing death was accidental or intentional. The presumption is that it was accidental. (Grand Lodge vs. Bannister, 80 Arkansas, 195; 96 Southwestern Reporter, 742.) In other words, where the evidence confines the inquiry to the conduct of the insured himself, it is always a question of fact whether the act resulting in death was by accident or design.

Illuminated by the reasoning of the reported adjudications on this precise point, it seems clearly manifest that the charge of the District Court, submitting the question of accident to the jury, was not only squarely within the issues made by the pleadings, but the charge, taken as a whole, was as favorable to the defendant Company as it had any reason to expect. The jury was plainly told that—

> "If he took his own life, whether sane or insane, the verdict must be for the defendant."
>
> Record, page 291.

VII

Assignments of Error, numbered, respectively, II, VIII, IX, X, XII, XIII and XIV are all based upon the contention, more or less clearly expressed that there is no evidence to sustain the verdict of the jury. More specifically, the II and VIII assignments are based upon the refusal of the Court, at the conclusion of plaintiff's case in chief and at the conclusion of all of the evidence in the case, to entertain the alternative motion of Plaintiff in Error for a non-suit or a directed verdict; the IX and X assignments upon the refusal of the Court to give the peremptory instructions in favor of the Insurance Company, which do not appear, however, to have been made the subject of an exception (Record, page 288); the XII assignment is predi-

cated on the proposition that the "verdict of the jury is not sustained by the evidence;" the XIII, that "there is no testimony tending to sustain the verdict of the jury;" whilst the XIV complains that "the verdict of the jury was contrary to the law."

Record, pages 52, 59, 60, 61, 66, 67 and 68.

The decisions are uniform that questions of fact will not be reviewed by the Circuit Court of Appeals on writ of error; for example, in **Truckee River General Electric Company vs. Benner** (211 Federal Reporter, 79, 81), your Honors used this language:

> "The facts in the case, as well as the argument of Counsel, suggest the injustice of permitting the recovery of $7,000 in favor of three able-bodied young men, capable of supporting themselves, and one married sister who is not shown to be in need, for the death of a brother nearly 19 years of age, who was under no obligation to contribute to their support, and probably would soon have married and ceased his contributions. But this Court has nothing to do with the question whether the damages were excessive. The jury having fixed the measure of damages, and the court below having refused to set aside their verdict, the only questions for our consideration are whether or not there was error in the admission or exclusion of evidence

or in the giving or denying of instructions to the jury."

Notwithstanding this salutary rule, it is doubtless true that if there were, in fact, no evidence to sustain the verdict of the jury, a question of law might be submitted under the several assignments of error referred to, and out of an abundance of caution the more salient features of the evidence, as disclosed by the Record, will be briefly reviewed. The statement of the evidence contained in the opinion of the learned trial Judge, denying the motion of Plaintiff in Error for a new trial, is adopted, with citations of the pages of the printed Record at appropriate points as the following

STATEMENT OF THE CASE:

"On the morning of his death, the deceased was observed between eight-thirty and nine o'clock walking through town and out along the track of the Southern Pacific Company towards Sparks, and about an hour later was found in a moribund condition lying in a cut or depression by the side of the track some distance east of Reno. He was apparently unconscious when found, but was still breathing in a heavy or stertorous manner. The coroner and sheriff reached the scene sometime after ten o'clock, and on their arrival found him dead. The place where the body lay was locally referred to as the 'Gravel Pit' or 'Oil Pit', a deep sunken way or

cut along the railroad track between Reno and Sparks, adjoining the grounds of the Nevada State Insane Asylum, with a wagon road running through it to facilitate loading and hauling oil, from a tank situated on the Asylum ground, adjoining the railroad right of way.

RECORD, pages 150, 231; EXHIBITS "D", "E", "F", page 314.

"The body was lying on its right side with the right arm partly extended at an angle from the body, and the left lying across the abdomen." (Record, pages 171, 172.) "A pistol— a Savage automatic of .32 caliber—which the evidence tended to identify as one purchased by the deceased the day before, was lying some few inches from the right hand, and an empty cartridge shell of .32 caliber was found on the ground near the body. The head was lying up the slope of the cut with the feet extending into or near the wagon track." (Record, pages 95, 96.) "The clothing was not in disorder, except that the hat had fallen off. There was no evidence at the point where the body lay of any disturbance of the ground to indicate a struggle. The deceased's watch, a small sum in coin, and some other small articles were found on his person. Blood was oozing from the mouth and nostrils, and a fresh bloodstain was found on the right arm of the coat at the elbow. (Record, page 181, and the coat EXHIBIT "C". "Investigation disclos-

ed a wound in the back part of the throat or mouth a little to the right of the median line, leading through the soft palate and into the brain cavity, of a size sufficiently large to enable the insertion of the middle finger of a man's hand, and so located as not to be visible except by opening the mouth and depressing the tongue; fractured bone could be felt in the wound, and a stellar-shaped fracture of the skull was found on the back part of the head just above and to the right of the occipital protuberance, with a small fracture of skull-bone pushed out beyond the regular contour of the skull, but no exit wound through the scalp,— the fracture being on a line a little upwards from the point of entrance of the wound in the throat."

Record, pages 193, 194.

"While the autopsy was not such as to definitely disclose the producing cause of the wound, the opinion of the sheriff and doctors was that the wound was from a gunshot; there was no apparent injury to the lips, teeth or tongue, and the testimony of the physicians was to the effect that the wound could not, in their opinion, have been caused other than by the insertion of the weapon in the mouth without injuring the adjacent organs, unless inflicted while the deceased had his mouth open in the act of yawning or

retching, or crying out in agony; and that it was of a character to produce death." (See, Record, page 202.)

"In the first place, the evidence is wholly lacking in anything in deceased's situation tending to disclose motive for taking his own life. He was in what may be termed fairly easy financial circumstances. He was a rancher and stockman, owning a large ranch with stock and other personal property and having his home in Reno. His ranch was under mortgage for $15,000, but the loan was not due for nearly a year and a-half, and the evidence tended without controversy to show that his ranch was worth at least twice the amount of the mortgage, while he had to his credit in the bank at the time of his death a balance of something over $800; and nothing was shown to indicate that he was at any time to any extent disturbed over business affairs." (See, Record, pages 253, 256.)

"He was between forty-seven and forty-eight years of age, a large, strong, robust man, in good health, and of uniformily cheerful disposition; lived very happily with his wife and family, consisting of a number of children,—a perfect family, as testified by the minister of his church,—attended church frequently and a fraternal society of which he was a member." (See, Record, page 260.)

"The evidence disclosed that he had returned only two days before his death from a visit with his wife and other members of his family to the opening of the Panama-Pacific Exposition in San Francisco, where he had enjoyed himself and appeared very cheerful and happy throughout the trip. He had been in his bank the day before his death, and the president testified that he appeared perfectly normal in manner, while on the morning of his death he was up and about the house as usual with his family, dressed the baby, helped his wife in the kitchen, and was in his usual cheerful mood at the breakfast table; and a friend who met and talked with him for several minutes on the street when he was on his way to the scene of his death testified that he had never appeared more cheerful or contented." (See, Record, pages 241, 242, 254, 148, 224, 276 and 277.) "It appeared, moreover, that he did not seek or apply for the insurance involved, it having been taken out at the solicitation of an agent of the defendant; and there is no suggestion that at the time the policy was issued, or at any other time, the idea of self-destruction was even remotely entertained. So much for the question of motive." (See, Record, page 256).

As in murder and other like crimes, so also in this character of action, the courts have always attached great importance to the absence of ade-

quate motive, where the effort has been to establish the theory of suicide purely from circumstances. Thus in **Modern Woodmen vs. Kozak** (63 Nebraska, 153, 88 Northwestern Reporter, 248), the Supreme Court of Nebraska, discussing the absence of motive, used the following language:

> "But there is another fact of which the jury could not have been ignorant, namely, the absence of all evidence in the record tending to show motive inciting to self-destruction. Self-murder is abhorrent to the mind, and common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude."

In **O'Conner vs. Modern Woodmen** (25 L. R. A., new series, 1244), the Supreme Court of Minnesota used this language:

> "We discover in the record no motive, no cause, which might have prompted insured to deliberately take his own life. He had no family trouble, no despondency or brooding over other trouble, and was not in want or necessitous financial circumstances."

And, the absence of motive is emphasized by the circumstances surrounding the insured; for example, an inference that insured did not intentionally take his own life arises from the fact that he had a good home, or that he was married and lived

happily with his family (National Union vs. Fitzpatrick, **supra**); the inference against suicide is strengthened by proof that the insured was of good habits (Boynton vs. Equitable Life Assurance Society, **supra**); as, also, by proof that he was industrious and sober (Grand Lodge vs. Bannister, **supra**); as by proof that he was religously inclined (Modern Woodmen vs. Craiger, 90 Northwestern, 84); whilst evidence of the affectionate relations of husband and wife, the number of children and his relations with them are circumstances from which an inference against suicide may be drawn (Supreme Lodge vs. Beck, **supra**). These circumstances and many more appearing from this Record all tend to negative the theory or suicide; they emphasize the absence of any adequate motive for self-destruction, and "common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude" (Aetna Life Insurance Company vs. Milward, supra).

Continuing, with his analysis of the evidence, the District Court said:

> "The body of the deceased was first discovered by one Lalonde, a sheep shearer temporarily stopping at the time in Sparks. He testified in substance that he was walking on the railroad track and saw deceased lying in the cut and heard him breathing heavily; that thinking there was something wrong he called to two

other men whom he saw in the vicinity and they all went down to where deceased was lying or within a few feet of where he lay, saw the pistol near the body, and concluded that he had shot himself, went to a nearby point and telephoned to the sheriff, and when they returned to the place where the body lay life was extinct. These three men, Lalonde, Brown and Rudolph, afterwards testified at the inquest as to the fact of finding the body, but they had disappeared before the trial and could not be found or produced, and their testimony as taken before the coroner was read by consent. No definite effort, so far as appears, was made at the inquest to identify these men as to their permanent place of abode, their character, antecedents, or mode of life, nor as to how they came to be in the vicinity at the time. They testified that they were out walking and just happened to meet there. One of them testified that they heard no report of a gun." (See, Record, pages 114, 123.)

"The evidence tended to show that the ground where the body lay was sandy and damp, and of a character to clearly show the impression of footprints, and there were certain footprints testified to by the officers as having been found about the body. They differed somewhat, however, as to the result of their observations in this regard. The coroner testified that 'the only tracks were foot-prints of one person that led

to where the body lay'; that he saw no others. The sheriff testified: 'Arriving at the scene I found three tracks leading down to where the body was lying; one track leading to the spot, and two other tracks leading to within eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. * * * I saw no tracks other than what I have mentioned.' The undertaker who accompanied the officers, stated: 'I observed a few tracks coming from the east toward the body. I didn't take much interest in that; I was interested in other matters.'" (See, Record, pages 99, 158, 159 and 173.) "No effort was made to identify the tracks or footprints testified to as leading up to the body as those of the deceased, nor was it clearly shown whether those particular tracks stopped at the point where the body lay or were retraced; moreover, the inquiry as to the character of the soil and evidence of tracks was directed generally to 'the ground where the body lay,' and the fact was not developed whether the condition of the wagon road running through the cut was such that footprints of one walking in the roadway could be readily discerned or followed.

"Ex-sheriff Burke, Superintendent of State Police at the time of the death, an experienced officer, testified to making an examination of the

place where the body was found, and its immediate surroundings on Sunday, the day after the death, for any indications of other persons having been in the vicinity; and he stated that at a point about 100 to 125 feet from where the body lay, just across the railroad track, he found tracks in the soft, sandy ground, 'and observed a place where someone had been lying down.' (See, Record, page 235.)

"There was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The shopkeeper who sold the weapon to deceased testified that when deceased bought the pistol he asked him how it worked and to load it; that he informed him that he had but nine cartridges on hand, while the weapon carried more, but deceased said that would be enough, and they were inserted in the magazine before he took the weapon away. There was produced in evidence at the trial the pistol with eight unexploded cartridges and one empty shell, and the sheriff testified in substance that when he picked the weapon up from the ground the hammer was back—that is, the gun in a position to shoot by pulling the trigger—with a shell in the chamber, the others in the magazine, and one empty shell lying on the ground; that he removed the magazine and the shell from the chamber, picked up the shell on

the ground, and turned them over, with the weapon, to the coroner, from whose custody they were produced. It was developed on his cross-examination that his testimony at the inquest, as reported in the certified transcript of the proceedings, differed from this in one or two significant respects. It there appeared that when he was there being examined about the condition and contents of the pistol when picked up, these questions were put and answered: 'Q. Is this in the same condition that it was? A. No, sir, I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition. A. It is in the same condition with the exception that the safety was on the trigger; I took the shell out of the chamber, and there are nine in the magazine.' (See, Record, pages 165, 166, 252.) "And it was shown in this connection that with the 'safety on the trigger' the hammer could not be drawn back or cocked or the weapon exploded; that in that condition the weapon was harmless." (See, Record, page 249.)

"As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound, if missile it was. The surgeon conducting it, as indicated from the evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite

examination as to the producing cause of the wound in the throat; the scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore any evidence of having recently been discharged, such as burnt powder or otherwise." (See, Record, pages 194, 203-206.) While the presence of dirt in the barrel of the pistol when picked up indicated the contrary. (Record, page 157.)

"One other circumstance remains to be noticed to which much significance is attached by the plaintiff. When the body of the deceased was brought home from the coroner's there was observed by members of the family on the forehead over the right eye, just at the line of the hair and partly covered by it, evidence of an injury variously referred to by the witnesses as 'a dent', 'a depression', or 'a scar,' which the evidence tended to show had never before been observed by the members of deceased's imme-

diate family or others acquainted with him, including his family physician, who had attended the family for 11 years. It was described by the different witnesses as being all the way from an inch and a quarter to two or more inches in length, and three-sixteenths to a quarter of an inch deep—of sufficient depth and length, as one or two expressed it, to partly lay the little finger in it—but with little, if any, discoloration; it was first observed by the undertaker at his undertaking rooms, who said he thought it was a scar and paid no particular attention to it, but he testified that it was not caused by moving the body or handling it after death. The family physician characterized it as a bruise or scar, apparently made with a blunt instrument, which it had taken considerable force to produce—sufficient to knock a man down and perhaps render him unconscious—but as to how recently it had been inflicted, he stated it was impossible definitely to say, for the reason that such a wound, if inflicted when death shortly ensues, does not take on the same appearance or characteristics as under other circumstances; that the blood, being stopped in its circulation, has not the same tendency to extravasate or cause discoloration, as on a living person, and particularly in an injury to the scalp where the capillaries are not profuse. There was no evidence tending more definitely to disclose when or how this injury was inflicted upon the deceased."

(See, Record, pages 225, 238, 240, 244, 247, 263, 266, 267.)

"These are, in their material substance, the circumstances bearing upon the manner in which the deceased came to his death. Can it be justly said that, when considered as a whole, they point so inevitably and certainly to the conclusion of self-destruction that the jury as reasonable men were not justified in adopting a contrary view; and that their finding is so lacking in substantial support in the evidence that it is now the duty of the Court to set it aside? With a full appreciation of the responsibility, so strongly impressed by counsel as resting upon the Court, to supervise their verdict, and see, so far as lies within the proper exercise of its power, that it speaks the truth, I feel constrained to answer the inquiry in the negative."

CIRCUMSTANCES MUST BE PROVED, NOT ASSUMED:

The circumstances most strongly dwelt upon by Plaintiff in Error to support its theory of self-destruction are (1) the character of the wound in the throat or mouth; (2) the alleged purchase of the pistol found in close proximity to the body. But it is submitted with confidence that the circumstances relied on by Plaintiff in Error prove nothing more than death by violence.

For the purpose of the argument on this phase

of the case, the conflict in the testimony of the WITNESS FERREL, as to the condition of the pistol when picked up, is laid to one side; for, with the "Safety on the trigger" the insured certainly did not shoot himself; also, laying to one side, the fact that there was dirt in the barrel of the pistol, when picked up (see, Record, page 157), and giving the circumstances relied upon to support the theory of self-destruction their full value as evidence, what is proved? Plaintiff in Error assumes that the wound in the throat was caused by a gunshot. There is no direct evidence to support that assumption. It is a presumption or inference drawn from other circumstances in the case. No report or shot was heard; no ball or other missile was found in the wound; there was no point of exit! It is not only assumed that this wound was caused by a gunshot, but built upon that presumption is another, namely, that the wound in the throat was caused by a shot from the particular weapon found by the body. All of which is purely a matter of surmise, suspicion, speculation! Under the evidence, that wound may or may not have been produced by a gunshot; it may or may not have been caused by a knife; certain it is that there is no open or visible connection shown between the wound and the pistol. The wound was large enough to enable the insertion of the middle finger of a man's hand, the pistol carries a ball no larger than the ordinary lead pencil. "The fact that the bullet found in the head of the deceased was too small

to have been fired from the weapon found near the body is a circumstance not easily reconciled with the theory that he shot himself" (Modern Woodmen of America vs. Kozak, 63 Nebraska, 153, 88 Northwestern Reporter, 248.) Whilst in the instant case, no ball or other missile was found, and the producing cause of the wound in the throat is left by this Record utterly to conjecture, and here the case for Plaintiff in Error broke down. Counsel conceded this weakness in their case when, in order to show some possible connection between this wound and the instrumentality produced by them, they proceeded to call and examine Dr. S. K. Morrison, who testified to "a gun" but did not testify as to the particular weapon. (See, Record, page 208.)

The essential and all-important fact, namely, that the wound in the throat was caused by the particular pistol in evidence, is missing. It is entirely a matter of conjecture. There is no visible or open connection shown. The theory of suicide, broke down at the vital, pivotal point in the case. Starting with the theory of self-destruction, the defendant Company assumes that the insured shot himself, because they assume that he intended to destroy himself, because they assume that the wound in the throat was caused by the Savage automatic pistol found near the body; because they assume, in the face of dirt in the barrel, that the pistol had been recently discharged, because,

forsooth, they assume, through Doctor Morrison, that if a gun—not this particular pistol, but just a gun,—were held close against the body "a jagged, large, crater-like opening would be produced!" In the descriptive and wholly unrivaled phraseology of Distinguished Counsel, "It is a far shot!"

As stated by the District Court in the opinion denying the motion for a new trial:

> "As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound—if missile it was. The surgeon conducting it, as indicated from his evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite examination as to the producing cause of the wound in the throat. The scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore any evidence of having been

recently discharged, such as burnt powder or otherwise."

Record, page 26.

That a presumption cannot be based upon a presumption, an assumption of fact drawn from another assumption of fact, or an inference of fact predicated upon another inference of fact, is a fundamental principle of logic and of law, which has become well-nigh axiomatic in its application.

In this connection, the following from 1 MOORE ON FACTS, 599, is pertinent:

> "The circumstances must be proved, and not themselves be presumed. A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can be fairly or reasonably drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory."

In 14 Encyclopedia of Evidence, page 101, it is said, citing several authorities, that "A presumption cannot be based upon a presumption." And, in 3 Chamberlayne's Modern Law of Evidence, 1764, it is said: "In all cases the fact circumstantially relevant must be proved by direct evidence

unless admitted. It cannot itself be inferred from circumstantial evidence."

In **Evansville Metal Bed Company vs. Loge** (85 Northeastern Reporter, 979), the Supreme Court of Indiana, in discussing this salutary rule of evidence, used the following language:

> "No one questions but what the facts necessary to make out a civil cause of action may be established as well by circumstantial evidence as they may be by direct proof, and the circumstances may be such in some cases as to contradict and overcome the direct and positive testimony of witnesses to the contrary. Circumstantial evidence consists in reasoning from the facts which they may be by direct proof, and the circumstances may be such in some cases as to contradict and overcome the direct and positive testimony of witnesses to the contrary. Circumstantial evidence consists in reasoning from the facts which are known or proved to establish such as are conjectured to exist. The process is fatally vicious if the circumstances from which we seek to deduce the conclusion depend also upon conjecture or inference, whether they arise in a civil or a criminal case. * * * In People vs. Kennedy, 32 N. Y., 141, Justice Denio, speaking for the court with reference to this kind of proof, said: 'The logic upon which circumstantial evidence is based is this: That we know from our

experience that certain things are concommitant of each other. In seeking to establish evidence of one, when the direct proof is deficient or uncertain, we prove the certain existence of the correlative fact, and this establishes with more or less certainty, according to the nature of the case, the reality of the principal fact. But the reasoning is a perfect fallacy if the defect of proof which renders it necessary to call for the aid of the collateral circumstances equally attaches to such collateral circumstances. **'It is like the blind leading the blind.'** When circumstantial evidence is relied upon to prove a fact, the circumstances themselves must be proved and not presumed."

In **United States Fidelity & Guaranty Company vs. Des Moines National Bank** (145 Federal Reporter, 273), the action was instituted by the bank against the Fidelity Company to recover on its contract of insurance for the alleged defalcation of one Kelly, an employee of the bank, the proof showed an actual shortage in the bank's reserve cash of $5000, but what became of the money was not shown but left to conjecture. The evidence was wholly circumstantial. Mr. Circuit Judge Van Devanter, speaking for the Circuit Court of Appeals in the Eighth Circuit, used this language:

"Thus the charge proceeded upon the view that, while the matter of when and how the loss

occurred and what became of the money was not shown but left to conjecture, Kelly's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. * * * We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelly, and applies to him the rule applicable to a bailee or other custodian whose situation is such that the loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelly occupied no such relation to this money. * * * It is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one or the other of the employees, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelly. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. Asback vs.

Chicago, etc. Ry. Co., 74 Iowa, 248, 37 N. W., 182. * * * As well said by the Supreme Court of Iowa in Asback vs. Chicago, etc. Ry Co.: 'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.' "

In **Cosgrove vs. Pitman** (103 California, 268), the Supreme Court of California used the following language:

"Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but, when a plaintiff instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred gives the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption, the inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

In **United States vs. Ross** (92 United States, 281), speaking of the impropriety of basing a presumption upon a presumption, of drawing an inference from an inference, the Supreme Court said:

> "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. The law requires an open, visible connection between the principle and evidentiary facts, and the deduction from them, and does not permit a decision to be made on remote inferences."

In **Manning vs. John Hancock Mutual Life Insurance Company** (100 United States, 699), the Supreme Court used this pertinent language:

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in U.S. vs. Ross, 92 U. S., 281, 284, we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we

added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

And, in **Globe Accident Insurance Company vs. Gerisch** (165 Illinois, 625, 54 American State Reports, 486), the action was brought to recover under a contract of casualty insurance indemnifying against injuries resulting, directly and independently of all other causes, through external, violent and accidental means. The facts are sufficiently indicated in the following excerpt from the opinion of the Court:

"There is, however, no proof that the deceased strained and injured his body 'by lifting a box of cinders and ashes,' and one essential fact, indeed, the all important fact, is therefore wanting in order to make out this case. If from the fact that he lifted a box of ashes and from the

further fact that he, not long afterward, suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz., that Gerisch lifted the box, is itself but a presumption drawn from other facts in evidence, and the law is, that a presumption cannot be based upon a presumption, for there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption: Dougless vs Mitchell, 35 Pa. St., 440; United States vs. Crusell, 14 Wall., 1; United States vs. Ross, 92 U. S., 281. In the case last cited, it is said, in passing upon this question: 'Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' The record therefore does not make out a **prima facie** case for the plaintiff, and the trial court erred in overruling the demurrer to the evidence."

Tested by this rule, the most that can either be fairly or justly claimed from the circumstances

urged by Plaintiff in Error, namely, the wound in the mouth and the finding of the weapon near the body is that they show that the insured met a violent death; but how or by whom that wound was inflicted is purely a matter of conjecture.

But assuming, with Counsel for Plaintiff in Error, for the purpose of the argument, that the pistol found near the body was the producing cause of death, even then, the isolated circumstances urged by Plaintiff in Error against this judgment, are not, when considered in the light of judicial precedent, so unerring as to necessarily negative the theory of accidental death. The cases cited and analyzed in the preceding pages of this Argument were selected because the circumstances in each are of very similar import to the isolated facts relied upon by the defendant Company here, even when aided by the unwarranted assumption of an important link in the chain of circumstances, yet the State and Federal Courts have refused to hold that the jury was not justified in finding against the theory of self-destruction, and declining to interfere with the verdict. Counsel assumes the vital, pivotal, connecting link or circumstance, without which the circumstances in evidence prove nothing but death by violence; and it would be going far to say, in the face of the language of the Supreme Court (Grand Lodge vs. Beck, **supra**), that such a wound could not have been the result of accident, from a care-

less handling or examination of the weapon, in view of the fact, which the evidence tends to disclose, that the insured was unfamiliar with its use (Record, page 112), and in view of the further fact, testified to by Doctor Gibson, under examination by Plaintiff in Error, that there were several circumstances under which such a wound might be caused by a gunshot discharged from a point outside the mouth, namely, "yawning, retching, hallooing or crying out in agony." (Record, page, 202.) But, when all of the circumstances disclosed by this record are considered as a whole, whatever sinister significance the isolated circumstances relied upon by Plaintiff in Error may have, as a matter of first impression, sink into insignificance as indicitive of the cause of death. There is much to indicate that the Savage automatic pistol was not the instrumentality of death, such, for instance, as dirt in the barrel of the pistol, indicating that it had not been recently discharged; the size of the wound in the throat compared with the caliber of the weapon; the high power and penetrating force of the Savage automatic, carrying steel-jacketed bullets, coupled with the fact that the wound in the mouth had no exit, nor was any shot heard, or any ball or other missile found in the wound, and the injury to the forehead, which, on the theory of self-destruction is not only unexplained—it is inexplicable.

So far as the alleged purchase of the pistol is

concerned,—Who can read the testimony of the WITNESS COLLINS (Record, pages 110-113, and 128-143) and say that the jury was not justified in doubting that he sold either the, or any, pistol to William C. Neasham? The only matter, occurring during the preceding twenty years, about which he was certain, according to his testimony on cross-examination, was the particular alleged transaction with the insured; and the witness did not even pretend to identify the weapon by its number, but by a private mark on the magazine, and he told the jury that he had sold, during that year, a hundred Savage automatic pistols, marked them all in the same place, with the same punch (Record, page 142); and the amusing part of the whole thing was **that no punch mark is visible on the magazine** (Vide, Exhibit No. 1). But assuming that there was some mark visible only to the witness himself, as a matter of inference **it is just a hundred to one that Collins did not sell to William C. Neasham the particular pistol found by the body!** That the Savage automatic pistol was found near the body is conceded; that it was ever sold by Collins to Neasham is open to grave doubt; that that pistol was the instrumentality of death is at best a matter of conjecture, surmise, speculation!

But assuming this, it is not of much significance. It may have been dictated by any one of the many considerations which prompt the purchase of such

weapons and in no wise connected with a purpose of the insured to take his own life. And as to finding the weapon by the body, that is a feature which characterizes so many of the cases cited in this Brief as to have little, if any, significance. As was said by the Supreme Court of Minnesota, in Kornig vs. Western Life Indemnity Company, **supra**, in discussing the circumstance of a revolver found loosely gripped in the right hand of the deceased:

> "In the nature of things this circumstance is by no means conclusive. Nothing is more common in the history of crime than to place the means of death near or in the hands of the victim."

And, as graphically stated by the Supreme Court of Kentucky, in Aetna Life Insurance Company vs. Milward, **supra**, speaking of such weapons being found in the immediate presence of the deceased:

> "In the absence of mental derangement, of any known fact calculated to unseat the judgment and to overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all of the facts are inconsistent with the theory of suicide, except simply the dead body in the presence of its instrument it would be unnatural and illogical to confine the

inquiry to that incident, and declare the death suicide."

THE THEORY OF ASSASSINATION:

Whilst it may be readily inferred, from all the evidence, that the wound in the mouth of deceased was inflicted in a close, deadly struggle with an assailant, or after insured had been knocked down with a blow on the head, causing the otherwise unexplained injury on the forehead, the weapon was discharged in his mouth; and, if so caused, the injury in the forehead, according to the uncontradicted evidence of Doctor Ascher would not take on the characteristics of discoloration as under other circumstances; and to account for the condition of the clothing, the large fresh blood-stains at the elbow of the right arm, and the absence of any indication of a struggle where the body lay, it might well be that the assault was committed on the railroad track, or at the point indicated by the Witness Burke, where he "observed that someone had been lying down" and the body carried to the gravel pit and there disposed, as found, for the very purpose of indicating to mere superficial observers the fact of suicide; and if so, then, the peculiar atavism of crime might cause the assassin to leave the weapon by the body in the very condition which Ferrel swore at the inquest the pistol was in when he picked it up! Over and over again, every variety of human intelligence has endeavored to create an arbitrary consistency of

events; Over and over again, human ingenuity and human intelligence have failed to make the requisite adjustment! To make the case of murder complete, there is nothing lacking from this Record but the identity of the assassin. The **corpus delicti** is established by an overwhelming mass of circumstances—cogent, consistent, convincing! No one of them inconsistent with the crime of murder. A man in the prime of life, in good health, of a cheerful and happy frame of mind, owning a large ranch, in fairly easy financial circumstances, living in town with his family, "an ideal family",—with eight hundred dollars, is at home all the morning, dresses the baby, helps his wife, has breakfast with the family, and at about 8:30 o'clock goes down town—in one short hour he is dead. There is an injury in the forehead, probably resulting from a blow from some blunt instrument, applied with sufficient force to knock him down and perhaps render him unconscious, a wound in the throat, large enough to enable the insertion of the middle finger of a man's hand, the exact cause of which is left to conjecture, and perhaps other injuries. The surgeon performing the autopsy said that death was immediate. Four or five persons, two from Reno, one from Sparks, the other or others wholly unaccounted for, met at the place where the body lay—just out for a walk, they heard no shot, and the insured was still breathing when, according to their story, they arrived at the

scene. They took the only possible course to divert suspicion from themselves; they suggested suicide, and notified the authorities in Reno. The regularly constituted officials--the Coroner, Sheriff and Undertaker hastened to the scene and with a mere superficial examination, with an autopsy unworthy of the name pronounced the death suicide, and then, as disclosed by this Record, bent every effort to vindicate their preconceived opinion, which was utterly at war with most, if not in fact all, of the evidentiary facts and circumstances in the case. The jury, in the calm atmosphere which pervades the Federal Courts, may well have reasoned in this way, and it would not involve a resort to speculation, but legitimate deductions from all of the evidence in the case (Aetna Life Insurance Company vs. Milward, **supra.**)

Since Counsel for Plaintiff in Error seem to see visions—**Omne ignotum pro magnificio est!** they might with equal prodigality predicate their preconceived theory of self-destruction on the fact, disclosed by the record, page 309, that the insured was born in the State of California on the 13th day of November, 1866!

MISCONCEPTION OF PLAINTIFF IN ERROR REGARDING THE LEGAL PRINCIPLES INVOLVED:

The authorities relied upon by Plaintiff in Error, regarding the Burden of Proof, are confined with-

out exception either (A) To contracts of accident insurance; or (B) To some peculiar form of Life Insurance contract. Unquestionably, where the action proceeds upon a contract of accident or casualty insurance the burden of bringing the **cause** of the injury or death within the terms of the contract ("external, violent and accidental means" being the usual formula of such policies), rests upon the beneficiary. But that is not this case. Here, the contract is payable by its terms on due proof of death, and the provision relied upon by Plaintiff in Error is an **exception** printed on the third page; and under these circumstances it has been sufficiently demonstrated that the burden of proof rested upon the Company. In **Fondi vs. Boston Mutual Life Insurance Company** (112 Northeastern Reporter, 612), cited at page 91 of the Brief for Plaintiff in Error, the contract of insurance contained the following clause, as a condition precedent to the taking effect of the contract:

> **"Provided, however, that no obligation is assumed by said Company prior to the date hereof nor unless on said date the insured is alive, in sound health,"** etc.

The contest there turned on the question whether or no the insured was in **sound health** on the date referred to in the policy as the point of time when the same should take effect. Of course, the Supreme Court of Massachusetts held, under

the peculiar provision of the contract presented, that the burden of proof was upon the plaintiff. The case is not in point. With this explanation, there is nothing in the 128-page Brief of Plaintiff in Error which requires further notice.

DAMAGES MIGHT BE IMPOSED UNDER RULE 30:

It is respectfully submitted that no sufficient reason can be assigned from this Record in support of the contention that the insured deliberately committed suicide; on the contrary, in view of all of the evidence in the case, it is submitted that the efforts of Plaintiff in Error to defeat this contract have been made without any **bona fide** expectation of establishing the theory of self-destruction but rather with the idea of delay; and, if so, under the provisions of paragraph 2, Rule 30, Plaintiff in Error, in addition to the judgment, interest and costs, might very properly be adjudged to pay the beneficiary (Defendant in Error) reasonable damages.

THOMAS E. KEPNER,
Attorney for Defendant in Error,
Reno, Nevada.